No. 88-7351

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

JEFFREY ALAN WALTON,

Petitioner,

vs.

ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 19, 1989
CERTIORARI GRANTED OCTOBER 2, 1989

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CHRONOLOGICAL LIST OF RELEVANT EVENTS

March 21, 1986 – Petitioner indicted for first degree murder and related felonies

December 11, 1986 – Petitioner's jury trial commences

December 16, 1986 – Jury commences deliberations

December 16, 1986 – Jury sends note to trial judge asking "If a person is present during the commission of Felony Murder, but does not 'pull the trigger' is that person guilty of Felony Murder?' "

December 16, 1986 – Jury returns verdict of guilty of first degree murder

January 26, 1987 – Sentencing hearing commences before trial judge

January 27, 1987 – Sentencing hearing concludes; trial judge sentences Petitioner to death

January 27, 1987 – Petitioner's Notice of Appeal filed

February 2, 1989 – Opinion and judgment of Arizona Supreme Court affirming petitioner's conviction and sentence

February 17, 1989 – Petitioner's Motion for Reconsideration filed

March 21, 1989 – Order of Arizona Supreme Court denying Petitioner's motion for reconsideration

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA
The 21 day of MARCH 1986

72-GJ-236

STATE OF ARIZONA, Plaintiff vs. JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER Defendant(s)	INDICTMENT CAUSE NO CR17537

The grand jurors of the County of Pima, in the name of the State of Arizona, and by its authority accuse

JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER

and charge that in Pima County:

COUNT ONE (FIRST DEGREE MURDER, A CLASS ONE FELONY)

On or about the 2nd day of March, 1986, through the 3rd day of March, 1986, JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER murdered THOMAS DALE POWELL, in violation of A.R.S. §§ 13-1105, 13-703, and 13-710.

COUNT TWO (ARMED ROBBERY, A CLASS TWO FELONY)

On or about the 2nd day of March, 1986, through the 3rd day of March, 1986, JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER robbed THOMAS DALE POWELL while armed with a deadly weapon, or a simulated deadly weapon, to wit: a gun, in violation of A.R.S. §§ 13-1902, 13-1904 (A)(1) and (B), 13-701, 13-702, 13-801, 13-803, 13-808, 13-604 G, 13-604 B and D, and 13-604 M.

TPD 8603045002

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY
By /s/ Kate Dawes
Dated 3-21-86

True Bill
/s/ illegible
Foreman of the
Grand Jury

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA
The 21 day of MARCH 1986
(Caption omitted in printing)

The grand jurors of the County of Pima, in the name of the State of Arizona, and by its authority accuse

JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER

and charge that in Pima County:

COUNT THREE (KIDNAPPING, A CLASS TWO FELONY)

On or about the 2nd day of March, 1986, through the 3rd day of March, 1986, JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER

kidnapped THOMAS DALE POWELL, a Class Two Felony, with the intent to inflict death, physical injury on him and/or aid in the commission of a felony, in violation of A.R.S. §§ 13-1304 (A)(3) and (B), 13-701, 13-702, 13-801, 13-803, 13-808, 13-604 G, 13-604 B and D, and 13-604 M.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By /s/ Kate Dawes
Dated 3-21-86

True Bill

/s/ illegible
Foreman of the
Grand Jury

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA
The 21 day of MARCH 1986
(Caption omitted in printing)

The grand jurors of the County of Pima, in the name of the State of Arizona, and by its authority accuse

JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER

and charge that in Pima County:

COUNT FOUR (THEFT BY CONTROL, A CLASS THREE FELONY)

On or about the 2nd day of March, 1986, through the 3rd day of March, 1986, JEFFREY ALAN WALTON, aka, MICHAEL DICKENSON and ROBERT GRIFFITH HOOVER committed theft by knowingly controlling property with a value of $1,000 or more, as follows: a 1985 Ford Escort, 4-door hatchback, light blue in color, bearing Arizona license plate number CSX958, which is a motor vehicle, belonging to LINDA DEAN POWELL, in violation of

A.R.S. §§ 13-1802 (A)(1) and (C), 13-701, 13-702, 13-801, 13-803, 13-808, 13-604 B and D, and 13-604 M.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By /s/ Kate Dawes
Dated 3-21-86

True Bill

/s/ illegible
Foreman of the
Grand Jury

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA

[31] [Caption omitted]

[Prosecutor's Opening Statement]
Tucson, Arizona
December 12, 1986

* * *

There are four charges as the judge has told you, one is first degree murder, at the close of the case the judge will tell you what the law is. So you have some idea when you listen to the witnesses about what the charges entail, let me tell you the State has the burden of proof beyond a reasonable doubt as to each of the elements of first degree murder. When you listen to the evidence the State has to prove to you beyond a reasonable doubt that it happened one of two ways. The legislature says you can do first degree murder one of two ways.

The one most are familiar with, that is premeditation, you think about it and you kill somebody. And that premeditation, when you listen to the evidence about that, there is no time period required as long as there's time for the defendant to reflect upon what he does, the time it takes to walk somebody from the car to a desert area, put them on the ground and shoot them, that's premeditation. You folks will find from the facts whether he intentionally killed somebody with premeditation.

The second way of first degree murder is what [32] is called felony murder. Felony murder means that, the legislature provides that there are certain felonies that are dangerous enough, the inherent dangerousness involved in the commission of these felonies provides that if you

are involved in committing or attempting to commit certain felonies and if during the commission or attempted commission of one of those enumerated felonies a death results, you are guilty of first degree murder. Whether he intended it or not. Whether he intended it or not.

Armed robbery and kidnapping are two of those felonies. So if you are involved, and listen to the testimony, the defendant is involved in the commission or attempted commission of an armed robbery or a kidnapping and a death results, the death of Mr. Powell, the defendant is guilty of first degree murder.

The other thing I would ask you to keep in mind when you listen to the testimony is not just the question of who pulled the trigger as well. I submit to you at the close of the case the evidence will be that Mr. Walton pulled the trigger and shot and killed Tom Powell but there's, you all heard about accomplices, that is a person who is responsible as well for the conduct of somebody else. If he's [33] working together, if he is assisting, aiding, looking out while an armed robbery is being committed and a killing results, he has the same intent to commit that felony, so I ask you to consider that, it doesn't matter, Mr. Hoover is as guilty as Mr. Walton even though Mr. Walton pulled the trigger because he's involved in the commission of the felony. That's the second way.

* * *

[Excerpt of Direct Examination
of Sharold Ramsey]
Tucson, Arizona
December 12, 1986

[103] * * *

Q. Did anyone of the three of you take that gun with you when you went out to the Swap Meet this second time?

A. Yeah.

Q. Who took it?

Q. Mike.

Q. How do you know he took it?

A. I seen it.

Q. When did you see the gun?

A. I guess before we left the trailer.

Q. Okay. You guess. Do you remember seeing it before you left the trailer or not?

A. No.

Q. Did you see it at any point after you left the house to go to the Swap Meet the second [104] time, did you see that gun?

A. Yeah.

Q. Who had it when you saw it?

A. Mike.

Q. When you left the trailer and went to the Swap Meet the second time, up until that point had their been

any conversations between you, the defendant in this case and Robert Hoover about robbing somebody?

A. Yes.

Q. Did you talk about it at the trailer there?

A. Yeah.

Q. Was anybody else there when the three of you were talking about it?

A. Not that I remember.

Q. Did you talk about it on the way out to the Swap Meet?

A. I don't think so.

Q. What did you talk about at the house, and when I ask about your talking, just those times when this man, this defendant is sitting there, what did you say about robbing somebody?

A. Just that we were going to rob somebody. I think an old man that was drunk.

[105] Q. Why?

A. I guess so he wouldn't remember us the next day.

Q. When you say you guess, who suggested robbing an old man?

A. Well, that's just what I thought.

Q. Were there conversations about that?

A. About him not remembering things the next day if he was drunk?

Q. About it being an older man?

A. Yeah.

Q. Who talked about it being an older man?

A. All of us.

Q. And this was before you even leave the house?

A. I'm pretty sure.

Q. Did you still not have any money?

A. No.

Q. What about Mr. Hoover, did he have any money at that time?

A. No.

Q. Did Mr. Walton ever tell you, well, we don't need to do that, I got some money?

A. No.

Q. Did he say one way or another that he [106] had or didn't have money?

A. I'm pretty sure he didn't have money because we didn't have cigarettes or nothing.

Q. Okay. You didn't have cigarettes or nothing that day?

A. No. if he had money he would have had cigarettes.

Q. So when you left the house and you went out to the Swap Meet, after you got out to the Swap Meet did you stay there for awhile?

A. He walked around for a little while, everybody was closing up so we left.

Q. When you left did you leave walking or riding or what?

A. We were walking.

Q. As you were walking were there any other conversations between yourself and Mr. Hoover and Mr. Walton about robbing somebody?

A. Yeah.

Q. What did you talk about?

A. Just like where we were doing to do it.

Q. What were you going to do, what were the three of you talking about, what was it you talked about?

A. Just to tie him up and leave him [107] somewhere and take his car so we could get back home.

Q. Mr. Walton was part of the conversation about robbing him and tying him up and taking his car?

A. Yes.

Q. He was there and discussing it with you and Mr. Hoover?

A. Yeah.

Q. Did he ever say no, I don't want any part of it, it's a bad idea, I won't do it?

A. No.

Q. Did any of the three of you object to that?

A. No.

Q. You ever say, no, I don't want to do that?

A. No.

Q. You started, did you go back down East Speedway, did you start down Speedway Boulevard?

A. Yes.

* * *

[109] Q. At some point, ma'am, after you left the Alpha Beta did you end up out at a parking lot of a bar?

A. Yeah.

Q. What was the name of the bar?

A. Terry and Zekes.

Q. Had you ever been to that bar before?

A. No.

[110] Q. Did you stop and hang around out in the parking lot?

A. Yeah.

Q. How long had it been before you stopped and hung around in the parking lot at Terry and Zekes that you had hitched a ride with somebody?

A. Couple hours, I guess.

Q. Had you had anything to drink that day?

A. No.

Q. Had you smoked any marijuana that day as of the time you get in the parking lot at Terry and Zeke's?

A. Just when we hitched a ride we smoked a couple joints.

Q. When you hithced (sic) a ride who all smoked a joint?

A. All of us.

Q. All of us being who, yourself?

A. And Rob and Mike and the guy driving and his girlfriend.

Q. So you say when you got this ride a couple hours before you smoked marijuana?

A. Yes.

Q. How much marijuana?

A. Just a couple of joints.

[111] Q. Okay. Were you affected or feeling the effects of the marijuana when you got to the parking lot at Terry and Zekes?

A. No.

Q. Besides the marijuana that you had that day, had you had any other kinds of drugs or alcohol or anything like that?

A. No.

Q. To your knowledge, to your knowledge had Robert Hoover taken any drugs or smoked any marijuana or drank a beer or had any alcohol besides the two or the couple joints or the joints that you passed around in this car that you got a ride in?

A. No.

Q. What about the defendant, did you see him drinking anything that day?

A. No.

Q. Did you see him besides these two marijuana cigarettes, did you see him smoke any marijuana or take any drugs that day?

A. No, not that I remember.

Q. Did you notice anything strange about his behavior, was he acting intoxicated or anything like that?

A. No.

[112] Q. Did he have any trouble talking with you and understanding what you were saying?

A. No.

Q. When you get out to the parking lot at Terry and Zekes, tell us exactly what the tree of you do, what you do, what Mr. Hoover does and what the defendant does when you are at this parking lot?

A. We just were waiting for someone to come out. And Mike was playing with the van, thinking that maybe he could get in and wait for someone to come out and get into the van.

Q. Wait a minute. Mike was playing with a van, what was he doing?

A. He was just seeing if he could get in.

Q. He was trying to get into a van?

A. Yeah.

Q. What kind of a van?

A. A Volkswagon van.

Q. Did he ever say why he was trying to get into the van?

A. So maybe he could get in and wait until somebody came out and got inside the van.

Q. What were you doing when Mike the defendant was playing or trying to get into this van?

A. Just standing up against the wall of the [113] bar.

Q. Leaning up against that wall?

A. Yes.

Q. What was Robert Hoover doing?

A. Standing with me.

Q. With you, Robert Hoover, when you say he was standing with you were you standing out there kissing or hugging each other or what were you doing?

A. I don't remember.

Q. How far away from you and Mr. Hoover was the defendant when he was trying to get into this van?

A. He was about four feet, I don't know.

Q. Not that far away?

A. Not really.

Q. What do you remember about the van, can you tell us as much as you can?

A. It was an orange VW van.

Q. And how, did Mike ever manage to break into or get into the van?

A. No.

Q. Did anyone of the three of you ever get into the van?

A. No.

Q. Did anyone else, did anyone ever come [114] out of the bar while you were standing out there in the parking lot?

A. Yeah.

* * *

[115] Q. Who came out of the bar, can you tell us what the person looked like?

A. He was tall and he had a crewcut.

Q. Crewcut?

A. Yes.

Q. You have to say yes or no?

[116] A. Yeah.

Q. Do you remember thinking about the kind of clothes he had an (sic)?

A. I think he had a white shirt on.

Q. When he came out did he go to the side of the bar there where you were leaning up against the wall?

A. Well, he went, he went around the, the back of the van. He walked around the back of it instead of walking down in front of the building.

Q. The man walked around the back of the van?

A. Yeah.

Q. Where was Mike trying to break into the van, was it the front, the back, the side?

A. The side.

Q. All right. When the man walked around the back of the van, did you or Mr. Hoover do or say anything to Mike when the man came out of the bar?

A. Just Rob whistled.

Q. Rob whistled?

A. Yes.

Q. Had you talked about Rob whistling if anybody came out?

A. No.

[117] Q. Rob just did that?

A. Yeah.

Q. After the man walked around the back of the van did you see him go to a car?

A. Yeah, he went in between the van and the car.

* * *

[118] Q. So when the man came out and Rob whistled what's the next thing you saw or heard?

A. I walked forward to where the van, because the van was blocking my way and I walked up and Mike had the gun on the man and just told him to get down and he put his stuff up on top of the car.

Q. When you say you walked over there, did Rob Hoover stay where he was or did he go with you?

A. He walked over there with me.

Q. And the gun that you saw Mike had, is that the same gun that you had seen before or a different one?

A. It was the same one.

[119] Q. When you say he came around, he had the gun on the man, what was the man doing?

A. He just put his hands up after he put the stuff on top of the car.

Q. What did Mike say if anything to the man at the time the man raised his hands?

A. I don't remember.

Q. Did he say something to him?

A. I don't remember.

Q. What did the man do?

A. He got on the ground. Just laid down.

Q. He was laying there on the ground next to the car?

A. Yeah.

Q. You say he put something on the top of the car, the man did?

A. Yeah, cigarettes and the keys and his lighter.

Q. What about his wallet?

A. I think he might have put his wallet up there too.

Q. Did one of you tell him to do that?

A. I think he just done that automatically.

Q. So he takes all these things out and then lays down on the ground after he puts all these [120] things on top of the car?

A. Yeah. I don't know if he was told to lay down or if he just done it, I don't remember.

Q. At that point did you say, I don't want to be involved, and take off?

A. No.

Q. You stayed there, didn't you?

A. Yeah.

Q. At any time did the man get up from the ground?

A. Yeah.

Q. Why did he get up, what made him get up?

A. I guess somebody told him to get up and get in the car.

Q. Who told him?

A. I don't remember.

Q. Do you remember that he was told to get in the car?

A. Yeah.

Q. You just don't remember who said that?

A. No.

Q. Did you get in the car?

A. Yeah.

Q. Where did you get in the car, the front or back?

[121] A. I got in the front.

Q. What did Mr. Hoover do, where did he get into the car?

A. He was driving.

Q. How did he get the keys?

A. Mike threw the keys to him.

Q. Mike threw the keys to Robert Hoover?

A. Yes.

Q. So where did the man get in the car?

A. He got in the back seat.

Q. What about Mike?

A. He got in the back seat.

Q. What did you do after all four of you got in the car?

A. We drove, Out.

Q. Where did you drive to?

A. To Gates Pass.

Q. Were you familiar with Tucson at that point and Gates Pass and Old Tucson?

A. No.

Q. You were familiar with Speedway Boulevard?

A. Yeah. I had been on Speedway before.

Q. So which way did you go on Speedway?

A. I don't know. Just, we just drove down [122] Speedway.

Q. When you say down Speedway would that be towards downtown?

A. I don't know.

Q. When you got the man in the car and you started driving, had the three of you talked about tying him up?

A. Yeah.

Q. Did anyone of the three of you have anything to tie the man up with when you stopped him in the parking lot of that bar?

A. No, not that I know of.

Q. How long did you drive approximately?

A. Not very long. I don't rememver.

Q. And okay, when you drove was it still light when you finally stopped driving the car?

A. No, it was dark.

Q. Were there lights out there?

A. There were no lights.

Q. Was the man talking while you were driving to where you finally went?

A. He was just answering questions because everybody was asking him questions about where he lived and stuff and if he had anymore money.

Q. How much money did he have?

[123] A. I think 45 dollars or something.

Q. And who was asking him if he had more money?

A. Just Rob and Mike, I don't remember.

Q. Were you talking to the man too?

A. No.

Q. Besides answering questions that were being asked, what else did the man say?

A. He said if we wanted to he would give us a ride somewhere and he wouldn't tell nobody.

Q. The three of you didn't take him on that?

A. No.

Q. You didn't stop the car, did you?

A. No.

Q. You kept driving?

A. Yeah.

Q. How was the man acting when this was going on?

A. Just scared.

Q. How do you know he was scared, what was he saying, what was he doing?

A. I don't know, you could just tell, I guess.

Q. You are in the front seat and the man is [124] in the back seat?

A. Yeah.

Q. You are sitting on the passenger's side on the front seat, which side is the man on as you were arriving out to this area?

A. He was behind me.

Q. Directly behind you?

A. Yeah.

Q. Were you surprised when you went all the way out to where you finally stopped the car?

A. I didn't really think about it.

Q. You didn't even think about it?

A. Not really.

Q. Did you finally stop the car and get out?

A. I didn't get out, no.

Q. Did the car finally stop somewhere?

A. Yeah, they pulled over on a I guess it was a pullout.

Q. What happened?

A. On the side of the road.

Q. What happened after you pulled out on the pullout?

A. Mike and the man got out and Rob and Mike were just arguing about what they were going to [125] tie him up with or whatever, and then Rob said he didn't care what he tied him up with, just hurry, and he got back in the car.

Q. What's the man doing when they are arguing about what?

A. I think he was back on the ground.

Q. How was the man acting after you pulled up at the pullout and they got out of the car?

A. He was scared.

Q. How do you know?

A. I don't remember. I just told him not to be scared because he wouldn't be hurt and then he got out of the car and then I guess he just got back down on the ground, I don't remember. I don't remember seeing him standing.

Q. So while Mike and Robert Hoover are arguing what to tie him up with you don't remember seeing the man standing up there?

A. No.

Q. Was he laying down next to the car on the ground?

A. I think so, yes.

Q. What happened after Rob Hoover said, I don't care what you tie him up with, just hurry up?

A. He just got back in the car.

[126] Q. What?

A. He got back in the car.

Q. Who did?

A. Rob.

Q. What about Mike, did he get back in the car?

A. No, he went out in the desert.

Q. And the man that had been in the car, what did he do?

A. He went with him.

Q. He's with Mike?

A. Yeah.

Q. Did Mike say anything to you as he walked away from the car?

A. He said to turn up the radio.

Q. To turn the radio up?

A. Yeah.

Q. Did you do that or did Mr. Hoover do that?

A. I don't remember.

Q. The radio was turned up, was it, ma'am?

A. Yeah.

Q. You turned it up real loud?

A. Really loud.

Q. And you and Mr. Hoover sat there in the [127] car?

A. Yeah.

Q. Up until the time Mike walked away from the car with the man had the man said anything or said who he was or what his name was, anybody ask him that, anybody care?

A. I don't remember him saying his name. He said about where he lived he said the area where he lived. But I don't remember him saying his name. I remember him saying that he had to go pick up his check. The next day. From the base or whatever. And that he had given his mom some money for his sister's rent or something. That's why he didn't have any more money.

Q. Did he ever say anything that – strike that. How long was Mike gone from the car with the man?

A. I don't know. Not very long.

Q. When you say not very long?

A. About five minutes, I guess.

Q. When Mike came back to the car, was the man with him?

A. No.

Q. What did Mike do when he got back to the car?

[128] A. He just jumped in the back seat and then we turned down the radio and he said that was loud. I

asked him what was loud and he said it sounded like a rifle or something like that, I don't remember. And then he said not to ask any more questions.

Q. Did you ask any more questions?

A. No, I just turned back up the radio.

Q. Did Mike talk to Robert Hoover or did Robert Hoover ask Mike any questions?

A. No.

Q. So what did the three of you do after Mike got back in the car and said that was really loud?

A. We went to Carl's Jr. on Oracle.

Q. What did you do at Carl's Jr.?

A. We bought hamburgers and stuff at the drive-through and we went home.

Q. Where did you get the money to buy the hamburgers?

A. From the man.

Q. Who had the money when you went through Carl's Jr. to buy the hamburgers?

A. Mike.

Q. Did you pay for the food or did he?

A. I think he handed it up to the front [129] seat and we gave it to them.

Q. What did you do after you went to Carl's Jr. and bought some hamburgers?

A. We went home.

Q. Is that home the same place on Miracle Mile?

A. Yeah.

Q. Was Teresa there when you got there?

A. Yeah.

Q. Anybody else?

A. Just the kids and her mom but I think that they were asleep.

Q. I'm sorry, who was asleep?

A. Teresa's mom, and the kids.

Q. Was Teresa awake?

A. Yeah, she woke up when we came in.

Q. Did you guys have any beer with your hamburgers?

A. Yeah, she had some beer when we got back.

Q. After you're back at the house and you are having your hamburgers and drinking the beer did Mike say anything else about what happened?

A. Yeah, he said that he should have checked the guy's pulse. To see if he was dead.

[130] Q. Mike said what?

A. Yeah.

Q. What else did he say?

A. He said that he had to be dead because he shot him in the head.

Q. What else did he say?

A. I don't remember.

Q. Did he ever talk to you about the man peeing in his pants, urinating in his pants?

A. Yes.

Q. Tell the jury what he said.

MR. HIGGINS: I will ask for more foundation as to when this happened.

MR. PEASLEY:

Q. Let me ask you, when did Mike make this statement about that?

A. I don't remember.

Q. Would it have been that same night or some other time?

A. It was that night.

Q. Who else was present at the time Mike was making these statements?

A. Me and Teresa and Rob.

Q. And what did Mike say about the man urinating?

[131] MR. HIGGINS: Your Honor, I would object and ask for more foundation because Teresa was there.

THE COURT: Objection is overruled.

MR. PEASLEY:

Q. What did he say?

A. He said he never seen a man pee in his pants before.

Q. And is this the conversation where Mike's saying all these things, is it the same time or a different time when you are sitting there having your hamburgers and drinking your beer?

A. It was about the same time.

Q. Did you ever see the gun after you got back to the trailer there?

A. Yeah.

Q. Tell the jury how that happened?

A. He just, he took out the shell. And put it in his pocket.

Q. Who did?

A. Mike.

Q. Did you see one shell or more then one shell?

A. Just seen one shell.

Q. Do you know, could you see whether theere (sic) were any other bullets in the gun or just the [132] one or do you know?

A. I don't know.

Q. Did Mike ever say anything about putting his foot on the man when he shot him?

A. I don't remember him saying that.

Q. Do you remember telling Detective Reuter when you talked to him that Mike had said he put his foot on the back of the guy's neck and shot him in the head?

A. Yeah.

* * *

[Excerpt of Direct Examination of David Bilodeau]
Tucson, Arizona
December 15, 1986

[12] * * *

Q. And when Mr. Dickerson, (sic) the defendant in this case, when he came over, you said it was about two o'clock in the morning?

A. Yes, sir.

Q. Were you in bed or what were you doing?

A. We were in bed.

Q. Did you get up when he came to the door?

A. Yes, sir.

Q. Tell the jury, did he come inside the house?

A. Yes, sir.

Q. After he came inside, did you have conversations with him?

A. Yes.

Q. Would you relate to the jury what the conversations were that you had with him?

A. He knocked on the door and he came in and he told me that he had just shot someone and that he [13] needed some dynamite. And I told him that I had had some problem with the law and that I didn't have any dynamite.

And the conversation just went on from there.

Q. What else did he say, sir?

A. Well, he wanted to get rid of the car.

He told me he had been out drinking and he went out to Gates Pass with this fellow he said was in the armed services. He didn't mention what branch.

And he said they got out there and the guy was wising off and he just reached over and he shot the guy in the head.

Q. This was what the defendant told you about what he had done?

A. Yes, sir.

Q. Did anyone come inside the house with the defendant when he came in and told you these things?

A. No, sir.

Q. Did you ever ask him any questions about what he was telling you?

A. Yeah.

Q. What did you ask him?

A. Where it had happened, where the gun was.

Q. What did he say when you asked him where it [14] had happened?

A. He said it happened out at Gates Pass.

Q. What did he say when you asked, if anything, when you asked him about what he did or how he did it?

A. Well, he said they were sitting around drinking and he said the guy was wising off and he asked him a couple of times to knock it off and the guy didn't knock it off.

So he just reached over and shot him.

Q. Did you ever ask him what he shot him with?

A. Yeah.

Q. What did he say when you asked him that?

A. He showed me a gun that he had in his back pocket.

Q. When you say he showed it to you, will you tell the jury how he did that?

A. Well, he reached into his pocket like this and he pulled a gun and it was in a holster and he showed me the gun.

Q. Can you describe the holster to us that you saw, sir?

A. It was a brown holster.

Q. What can you tell us about the gun that you saw?

[15] A. I believe it was a .22. It looked like a .22 derringer, up and over.

Q. When you say up and over, what do you mean?

A. Two shot.

Q. Okay. Were the barrels side by side or on top of one another or what?

A. I believe they were up and over, one on top of the other.

Q. One on top of the other?

What was the defendant saying when he showed you the gun that he showed you, sir?

A. Well, I asked him, you know, what he did with the body. And he told me he dragged it up underneath a tree.

He said he needed to get rid of the car and he asked me –

Well, I told him that he should get rid of the car. And –

Q. Did you ever tell him what he should do with the gun, if anything?

A. I told him he should leave it in the car.

Q. Why did you tell him that?

A. Well, like I say, I had just gotten into some trouble and I didn't need any further trouble. And I figured if he left the gun in the car, then the gun [16] would be there, fingerprints could be taken off it.

Because I didn't want to be an accessory.

Q. Did you think by his coming over that you could be an accessory to what it was that he had done?

A. If I didn't report it, yes, sir.

Q. Did you have any conversations with him about what he had taken from the man, if anything?

A. He said he took his wallet, he said around twenty dollars in cash and that was it.

Q. Were there any conversations about any identification belonging to the man?

A. Yes. He said he had burned all the identification.

* * *

[Excerpt of Prosecutor's Closing Argument]
Tucson, Arizona
December 16, 1986

[165] * * *

It for some reason in the course of your deliberations you don't feel that there was premeditation, and one of the jurors says, I don't think he really meant to. What if? What if? Then I'm asking you to go back and take a look at the felony murder rule. Because if in in (sic) your deliberations you decide that there wasn't premeditation, you focus in on the felony murder rule and if you have an armed robbery and a kidnapping, if you have one of those serious offenses and a death occurs in the course of committing that or in [166] furtherance of that then you have first degree murder. And I submit to you that the State has presented sufficient evidence to support convictions under both theories. Under both theories.

* * *

[196] So let me ask you this, Ladies and Gentlemen, and let's make a couple of assumptions for a moment, the judge is going to give you some other instructions, so let's make a couple of assumptions. Let's assume, let's assume that Becky Bolanos when she testified was accurate when she said she heard a conversation between Hoover and Ramsey. Make that [197] assumption if you will.

Let's assume further when she heard that conversation, we don't know for sure, let's assume it was true. Let's assume there was a party, let's assume at that party

Hoover took a gun, let's assume further that gun that Hoover took is the gun that was used in this case.

Let's make all those assumptions. In fact let's go even further. Let's assume that when they get out to the Gates Pass area and Thomas Powell was made to lie down on the ground and then get up and walk into the desert, let's assume it was Mr. Hoover who walked him out in the desert, let's do that for a moment, or Miss Ramsey if you choose. Let's assume either one of those. That it was they instead of Mr. Walton which we know is true, they instead of he walked him out in the desert with a gun; make that assumption for a minute and if you do, the judge is going to tell you that the defendant is accountable not only for his own conduct but for the conduct of his accomplices.

If Ms. Ramsey walked Thomas Powell out into the desert with a gun stolen by Mr. Hoover at a biker party, if Ms. Ramsey is the one who put her foot on Thomas Powell's neck and shot him in the brain; if [198] Miss Ramsey is the one who does that and he is an accomplice, he is just as guilty of first degree murder as if he pulled the trigger himself.

And Mr. Higgins when he's talking to you makes a statement, remember his statement, Shari Ramsey is a murderess, and indeed that is true. He starts to make a statement she is murderess just as Mr. Walton, then he catches himself, might be. Just as he might be.

Well, Sharold Ramsey is guilty of murder as well. She was involved and she was an accomplice and there was an agreement reached and I will talk about that some more before we end up with what we are talking about

here today. Shari Ramsey is guilty, Walton is guilty and Hoover is guilty and it simply doesn't matter who pulled the trigger. That is nothing more than a red herring. What Mr. Higgins would have you do is go back in the jury room and get into discussions and start disagreements about who pulled the trigger and who had the gun.

And I would submit to you, first, there's no question and the evidence I submit to you is overwhelming he did. Even if you go back there, wait a minute, wait a minute, what about this Becky Bolanos, what about maybe it was Hoover who stole the [199] gun, what about it, it could have been Hoover. Could have been Hoover who took the gun, could have been Hoover who pulled the trigger. It could have been Shari Ramsey.

If somebody says that back in the jury room I would ask you to point them to a couple of instructions. I will not read them, the judge will tell you what that law is, he will read every one of them to you and you will have a chance to look at them. I will not read everything, I'm not trying to mislead. One of them says a person is criminally accountable for the conduct of another if the person is an accomplice of such other person. Accomplice is a person who with the intent to promote or facilitate the commission of an offense aids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense. End of story. Mr. Walton when he is working with Mr. Hoover and Miss Ramsey, they all are accomplices of one another. They are all accountable not only for their own direct conduct but for the conduct of each other.

Who pulled the trigger? I submit to you it simply doesn't matter. And when you answer the

* * *

[Excerpt of Judge's Instructions to the Jury]
Tucson, Arizona
December 16, 1986

[217] * * *

A person commits first degree murder is such person acting alone or with one or more other persons commits or attempts to commit armed robbery or kidnapping and in the course of and in furtherance of such offense or immediate flight from such offense such person causes the death of any person. This type of first degree murder requires no specific mental state other than that which is required for the commission of the offenses of armed robbery or kidnapping.

With respect to felony murder, the State is not required to prove that the defendant actually committed armed robbery or kidnapping, only that he [218] intended or attempted to do so.

With respect to the felony murder rule, insofaras it provides the basis for a charge of first degree murder, it is not necessary that the State prove that the defendant intended to kill. It is only necessary that the State prove that the defendant intended to commit the crime of armed robbery or kidnapping.

The crime of first degree murder requires proof of the following three things. The defendant caused the death of another person; and number two, the defendant knew that he would cause the death of another person; and number three, the defendant acted with premeditation.

Premeditation means, one, that the person either intends or knows that his conduct will result in death to another person.

And number two, his intent or knowledge exists before the killing long enough to permit reflection.

An act is not done with premeditation if it is the instant effect of sudden quarrel or heat of passion. But no appreciable length of time must elapse between the formation of the intent to kill and the act, they may be as instantaneous as successive thoughts of the mind.

* * *

[Jury Question and Answer]
Tucson, Arizona
December 16, 1986

[6] * * *

THE COURT: One other thing I wanted to make a record on, if counsel don't mind coming up here just a second.

(The following proceedings were had at the bench:)

THE COURT: The last note that came out of the Jury room which is filed with the Clerk of the Court, was, "For a person to be guilty of felony murder, does he actually have to pull the trigger?", and Mr. Peasley was in my officer and read the note verbatim to Mr. Higgins.

Mr. Higgins suggested sending the note back with the following: "Please review the felony murder instruction and the accomplice instructions," which the Court did verbatim, and it was stipulated to by the County Attorney. Is that correct?

MR. HIGGINS: That's what happened, Judge.

MR. PEASLEY: That's correct.

ARIZONA SUPERIOR COURT, PIMA COUNTY

STATE	)	
	)	
v	)	NO. CR-17537
	)	
JEFFERY ALAN WALTON	)	
	)	VERDICT
Defendant	)	HON. THOMAS
	)	MEEHAN
	)	

We, the Jury, duly impaneled and sworn in the above-entitled action, upon our oaths, do find the defendant Guilty of FIRST DEGREE MURDER as alleged in Count One of the Indictment.

Filed: December 16, 1986

/s/ Larry Dempsey Imman
Foreman

IN THE SUPERIOR COURT OF THE STATE
OF ARIZONA IN AND FOR THE COUNTY OF PIMA

[Sentencing: Proffer of Jury
Foreman's testimony]
Tucson, Arizona
January 26, 1987

[248] * * *

MR. HIGGINS: I have Larry Inman who was the foreman of the jury outside, if you want to argue that we can do that. And I would like to call him if I can.

MR. PEASLEY: As I indicated to Mr. Higgins 24.1 and *State versus Hall*, which is 129 Arizona 589 and *State versus Callahan*, 119 Arizona 217, I think it's clear that jury affidavits or testimony are not admissible insofar as they concern the deliberating process of jury members. And Mr. Higgins apparently intends to elicit testimony from Mr. Inman concerning his deliberation process during the course of the jury deliberations in this case. The State would move to preclude it as not being [249] appropriate either by virtue of live testimony or affidavit.

MR. HIGGINS: Judge, I am going to ask him a couple of things. I know what the case law and rule 24 says. That goes to their mental processes as to assenting or dissenting from the verdict, I am not going into that, I'm going to ask questions in these two areas briefly, that being whether the jury utilized the felony murder or premeditated murder which were both submitted to them

over my objection in their deliberations, he will tell you the felony murder.

And then I would ask him if they considered, if the jury considered premeditated murder and he will answer yes, but never could decide on who pulled the trigger.

The reason that's important is because since the *Enmund* case, a Supreme Court case, and *MacDaniels* followed it in our Supreme Court, they found if the felony murder rule was used, Your Honor, because we don't have a jury decision on this, Your Honor has to decide whether the defendant killed, attempted to kill or intended to kill and that goes to the weight of that. The jury could not reach that decision and that's the arbiter of that fact.

[250] I will not go into things that go into the verdict, under the case law they can proceed under either or both. But I am going to ask which one and why. And that's all. I'm not going into the other things. And there are other things that arguably would affect the verdict and I am not going to question about that. That way I think there's not an invasion of the juror's province and it is a factual determination.

MR. PEASLEY: I don't know how much more you can inquire into the deliberation process than to be asking upon what the jury based its verdict. He's down here pursuant to a subpoena, he had to answer the subpoena; and to put a juror on the witness stand under subpoena and start making inquiries about the deliberating process I think is entirely improper under the rules. I would oppose the request, I frankly disagree from my understanding with some of the things Mr. Higgins says

but I don't want to start bantering about a jury decision because I think it's improper, I would move to preclude this testimony.

THE COURT: Show the motion to preclude the juror's testimony is granted. And Tom, I will accept that as an offer of proof for purposes of the record.

[Sentencing argument by
Defense Counsel and Prosecutor]

Tucson, Arizona
January 27, 1987

[282] * * *

MR. HIGGINS: Yes, sir I am going to read off factors that I think the Court can conclude from the evidence go to mitigation. I believe just before I mentioned the lack of flight and helping the [283] officers find the body and cooperating. The mental state testified to by Dr. Gurland is the end result of a viscious set of circumstances where as indicated in the materials, the sexual problems and difficulties and horror with his own mother and in the early years lead to an attempt to escape and cope and he did it as best he could.

Then I think there is substantial impairment shown at the time in question. And such cannot be made up and I would ask Your Honor to draw your attention to that tape recording, not the transcript but the tape of the statement of my client. Mr. Walton could not have faked the emotion, could not have faked quick enough to portray a series of events which only existed in his mind. He did not remember what went on there.

And I also think that there is evidence that he did not do the shooting. And that there is a probability should be enough in the Court's mind to impose an error on the side of the life sentence instead of the death penalty.

There's the ownership of the gun that you heard and both Shari Ramsey and Robert Hoover making a statement that matched each other, both as to the lie of the California events when they had the gun [284] but also as to where they got the gun, and the last witness testified what she overheard about that.

There is some evidence that the defendant shot Mr. Powell and that evidence came from his mouth and statements afterwards, I shot someone. And from Hoover and Ramsey.

The other mitigating factor that is important as your Honor knows and I already mentioned is the age of the defendant. But what really bothers me, and this is getting away a little bit from the mitigation but I think it's a consideration, it seems in this case if you are a victim that's a Marine and have a family and lots of support, that is going to result in a defendant being given the death penalty; whereas if you are a transient you are not.

Those letters that were appended, and I think improperly to the pre-sentence memorandum, there's no way in the aggravating circumstances that the grief of the family should be taken into account in what you do. It this was a case involving a transient it wouldn't be a concern, it's because he did have a family who were horribly upset, who are stricken, but that's not it, you cannot base a decision on life or death on who the victim was.

I would rather not be here, you would rather [285] not be here and Mr. Walton would rather not be here. But the community upset and outrage and the media attention because of the status of the victim are not grounds to

do that, that's why they're not listed in the aggravating circumstances. If you look at *State versus Watson*, this is the type of case that is not for the death penalty because it is not one of the aggravating circumstances cases. The State's memorandum pointing out things that they think go to cruel, heinous and depraved is just speculation and nonsense. The only thing we know is that no one knew that Mr. Walton was out there, that's why I objected to Your Honor considering that testimony as to what happened after he was shot. To be a depraved, cruel person, you have to know what was going on. And there is no indication that they knew.

And I think lack of remorse at the time also is not an aggravating circumstance. But I think throughout this and the fact that he cooperated and went to his fate with the detectives is an indication there was and is remorse. On the part of my client.

The fact he may end up if you decide to give him life imprisonment, 25 calender years in prison, he would be 45 years old before he was eligible for parole. Your Honor is aware of the so-called burnout [286] age for people in criminal activity, and that's over it. And I would ask you to treat this case like you treated a lot of other ones and give the benefit of the doubt that I know is in you to Mr. Walton.

THE COURT: Mr. Peasley.

MR. PEASLEY: It strikes me as interesting that Mr. Walton's lawyer gets up and talks about giving him a chance to live. Mr. Powell during this event, we had testimony to this effect, asked for his chance to live and Mr. Walton answered that by walking him out in the

desert and putting his foot on his neck and shooting him in the back of the head.

There are two aggravating circumstances, notwithstanding what Mr. Higgins said, and the Court has had the opportunity to review the memorandums submitted by the State and the memorandum by the defense and I am sure the Court is aware of cases that neither one cited, but those two aggravating circumstances are clearly established.

The offense was committed for pecuniary gain, Mr. Powell was robbed to get the money, a death resulted, the death was part of that, it was not an incidental thing that happened.

They took him from the bar and drove him out [287] to the desert area, when they didn't have anything to tie him up with, Mr. Hoover in his statement that this Court heard talks about one of the things that they were arguing about was what to do.

If you want to talk about cruelty to Tom Powell, for seven or eight or nine days that man is out in the desert. And it's not speculative as to what happened. The pathology report indicates the man was blinded, wandered around the desert with pneumonia, dehydration, running into cactus, falling down, trying to get up and not knowing where he was, not knowing whether he was near help or not, whether he was going further or closer to the road.

If you want to stop and put that aside for the minute then I think the cases are clear too that you can consider Mr. Powell and what must have been going through his

mind as he taken from that bar parking lot out to the desert area, it's not just a question of what happened after he was there, what about the period of time after taking him from the parking lot, being taken down Speedway where there are lights until finally he's getting away from the lighted areas, he's becoming concerned; imagine the things going through that man's mind as he was in that car, no real explanation, take my money, take my car, I'll [288] drop you off, anything, just don't hurt me. No reason at all.

—

Imagine, imagine the terror that Tom Powell was experiencing and that's cruelty. It's mental as well as physical suffering of the victim in this case. Imagine what was going through his mind when he was being told to get down in the car, one of them saying everything will be okay, conversations about where do you live, how much money do you have, things went on, then they get out to the pullout there in the desert and then they get out, and when Mr. Higgins uses the word in Mr. Walton's letter, animal, that seems to be a very accurate description at this point, then they get out there and then they have Mr. Powell lay down by the side of the car while Mr. Walton and Mr. Hoover stand there and argue about what to do with him or what to tie him up with.

Imagine laying on the ground with your face down on the ground while two animals talk about what's going to happen to you, what they're going to do. The suffering that he endured even before he gets to the desert. And afterwards he's wandering around, there is tremendous – it's beyond belief what that poor man was made to suffer because this man decided he wanted to take something

from [289] somebody. Because he ended up with somebody younger, he had wanted somebody elderly, that was what he was talking about initially, now its was somebody he was concerned about and he was going to shoot and kill and any suggestion that's not what he wanted to do and he didn't do exactly what he intended is ludicrous, he shot and killed Tom Powell, and that's what he was going to do.

Then the defendant gets up and hands a two or three page little note that he wants read to the Court to make us all see what a humanistic person he is now. Mr. Powell doesn't have the opportunity to live his life. The testimony is, Mr. Higgins comes out and says, let's not consider the feelings of the victim's family, that's inappropriate. They don't have Tom Powell anymore, And he's not around. They can't talk to him, they can't touch him, they can't do things with him and this man is the man who took his life away, he shot him in the head and left him out in that desert and Mr. Higgins says somehow he should be rewarded because he's younger.

The Court's familiar with those cases, unless age causes a substantial impairment of judgment it is not a mitigating circumstance, it's *Gerlaugh*, it's a number of cases, he's not so young under the [290] circumstances, this is not impulse. They talked about it, they planned around it, they looked for it, stopped at two or three different places until they get to where Mr. Powell is located and Mr. Powell is taken in the car, that's not a mitigating circumstance.

Then Mr. Higgins would have you reward the defendant because he didn't flee at some point, he helped the

officers find the body of Tom Powell. Well, the Court heard that statement. Mr. Walton started out by lying about it. Mr. Walton, oh, yeah, there were tears, I am sure they were sincere but they were not tears for Tom Powell. They were tears for Mr. Walton because he had been caught, tears because he didn't know what to do, more questions were asked that were more difficult to answer, then finally he started making admissions and lead the police to an area where the body was found only about 15 days after he left him out there.

Did he know? I suggest to the Court the evidence is and Mr. Walton knows that as well when he says I should have checked his pulse. I should have checked his pulse. Mr. Powell did move, said something that caused Mr. Walton to believe when he left that perhaps Mr. Powell wasn't dead.

[291] And that suffering that was endured for those eight or nine days is something that's attributable to Mr. Walton as well when he makes those statements. When you talk about cruelty you have not only the trip out there but what he endured later. When you talk about heinous and depraved you are talking about the mental attitude of the defendant afterwards.

What we have is a man who would have us believe because he reads a two or three page statement to the Court he somehow should get life instead of death after he did what he did to Mr. Powell. That heinous and depraved is what he does afterwards. I have never seen anybody pee in their pants before. Like this is an interesting, curious thing, this is how concerned he is. It's a

novelty for him, he has never had that experience before, now he has.

Now what he does is he goes and celebrates his experience by buying hamburgers and eating hamburgers and drinking beer, that is his relishment of the act.

Let's talkd (sic) about the case. It's unnecessary. What was done to Tom Powell was unnecessary, they could have taken his money as he offered, they could have left him there, they didn't have to kill him.

There are two aggravating circumstances that [292] are clearly established factually and legally. There are no mitigating factors. To the extent that the Court would consider there's any mitigating factors at all present, they are not substantial enough to call for leniency.

The State on behalf of the community and the victim's family in this case would ask the Court to impose the sentence that is called for, the only sentence that's called for in this case and that is the death penalty.

* * *

[Court's pronouncement of sentence]
Tucson, Arizona
January 27, 1987

[292] * * *

THE COURT: Mr. Walton, you having been found guilty by a jury of count one, first degree murder, a dangerous non-repetitive class one felony, it's the judgment of the Court that you are guilty.

The Court finds beyond a reasonable doubt, Mr. Walton, that you were the person that took the deceased, Mr. Powell, into the desert, put a gun to his head which resulted in his subsequent death.

The Court not only finds that beyond a reasonable doubt but beyond any doubt in this Court's mind.

The Court further has considered the following mitigating circumstances: your capacity to appreciate the wrongfulness of your conduct or to conform your conduct to the requirements of the law may have been [293] significantly impaired but not so impaired as to constitute a defense to prosecution.

The Court has also considered your age; the Court's also considered all other mitigating factors set forth in the pre-sentence report and all other mitigating circumstances as stated by your attorney on the record this date.

The Court finds the following aggravating circumstances. Number one, that you committed the offense in an extremely heinous, cruel or depraved manner.

Number two, that the offense was committed for pecuniary gain.

The Court finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

Therefore it is the sentence of the Court as to count one, first degree murder, that you be committed to the custody of the Arizona State Department of Corrections, from there to be put to death in the manner prescribed by law.

You having been found guilty by a jury of count two, armed robbery, a dangerous, non-repetitive class two felony, it's the judgment of the Court that you are guilty. The Court finds the same aggravating [294] circumstances.

In addition thereto the Court finds the following aggravating circumstances. Your prior felony convictions, the traumatic anxiety and loss to the victim's family; your failure to benefit from prior rehabilitative efforts on your own behalf.

The Court further finds that you are a significant danger to the community.

Therefore the Court finds that the presumptive sentence is not appropriate, it is the sentence of the Court that you be sentenced to the Arizona State Department of Corrections for imprisonment for the aggravated term of 21 years.

You having been found guilty by a jury of count three, kidnapping, a dangerous non-repetitive class two felony, it's the judgment of the Court that you are guilty. The Court finds the same aggravating circumstances. It's the sentence of the Court that you be committed to the

custody of the Arizona State Department of Corrections for imprisonment for the aggravated term of 21 years.

You having been fund (sic) guilty by a jury of count four, theft by control of property over 1,000 dollars, a nondangerous, nonrepetitive class three felony, it's the judgment of the Court that you are [295] guilty. The Court finds the same aggravating circumstances. It's the sentence of the Court that you be committed to the custody of the Arizona State Department of Corrections for imprisonment for the aggravated term of 10 years.

Counts two, three and four to run concurrent with each other, but consecutive to count one.

The date the sentence is to begin is as of today. And Sharon, do you want to file the notice of appeal, please.

* * *

FILED
January 27, 1987
JAMES N. CORBETT, Clerk
/s/ S. Cottrell Deputy

SUPERIOR COURT OF ARIZONA

PIMA COUNTY
TUCSON, AZ

[James N. Corbett]

Div XVI Date January 27, 1987 Judge or Commissioner THOMAS MEEHAN Deputy Sharon Cottrell

NO. CR-17537

STATE OF ARIZONA

VS

JEFFREY ALAN WALTON

DATE OF BIRTH: 1/29/66

County Attorney
By: Kenneth Peasley and
Kate Dawes
Thomas Higgins

Defense Counsel

SENTENCE OF IMPRISONMENT

8:30 a.m. The State is represented by the above named Deputy County Attorney; the Defendant is present with above named counsel.

Court Reporter Deirdre Muzall is present.

The Defendant is advised of the charge, the determination of guilt and is given the opportunity to speak.

Pursuant to A.R.S. Section 13-607, the Court finds as follows:

[ ] **WAIVER OF COUNSEL** The Defendant knowingly, intelligently, and voluntarily waived his

right to be represented by counsel after being advised of the right to be represented by counsel including the right to have counsel appointed free of charge if the Defendant is indigent.

[ ] **WAIVER OF JURY TRIAL** The Defendant knowingly, intelligently, and voluntarily waived his right to a trial by jury after having been advised of his right to same. The determination of guilt was based upon a trial to the Court.

[ ] **WAIVER OF TRIAL** The Defendant knowingly, intelligently, and voluntarily waived his right to a trial with or without a jury, his right to confront and cross examine witnesses, his right to testify or remain silent and his right to present evidence and call his own witnesses after having been advised of these rights. The determination of guilt was based upon a plea of guilty/no contest.

[X] **JURY VERDICT** The determination of guilt was based upon a verdict of guilty after a jury trial.

Date 1/28/87 By D 205, Deputy

Div XVI Date January 27, 1987 Judge or Commissioner THOMAS MEEHAN Deputy Sharon Cottrell

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the Defendant is guilty of the following crime(s), that upon due consideration of all the facts, law and circumstances relevant here, the Court finds that suspension of sentence and a term of probation are not appropriate and that a

sentence of imprisonment with the Department of Corrections is appropriate.

THE COURT FURTHER FINDS that there are circumstances sufficiently substantial to call for a Presumptive or Aggravated or Mitigated term as indicated on the following page. These circumstances are stated by the Court on the record.

AS PUNISHMENT, IT IS ORDERED that the Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

As to Count One, FIRST DEGREE MURDER,

THE COURT FINDS beyond a reasonable doubt that the defendant caused the victim's death.

The court has considered the following mitigating circumstances:

1) Competency to appreciate the wrongfulness of his conduct or to conform his conduct as to the requirements of law was impaired but not so impaired to prevent a prosecution.

2) The court also considered all other mitigating factors as set forth in the presentence report and as presented by his attorney this date.

THE COURT FINDS the following aggravating circumstances:

1) That the defendant committed the offense in an especially heinous, cruel or depraved manner.

2) That the offense was committed for pecuniary gain.

THE COURT FINDS that there are no mitigating circumstances sufficiently substantial to call for leniency, therefore,

Div XVI Date January 27, 1987 Judge or Commissioner THOMAS MEEHAN Deputy Sharon Cottrell

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count One, FIRST DEGREE MURDER

FELONY CLASS: 1

IN VIOLATION OF A.R.S. SECTIONS: 13-1105; 13-703; 13-710

DATE OF OFFENSE: 3/2/86

SENTENCE: IT IS THE SENTENCE OF THE COURT that defendant be committed to the Arizona State Department of Corrections and there to be put to death in the manner prescribed by law.

[ ] Mitigated [ ] Presumptive [ ] Aggravated

[ ] Nondangerous [X] Dangerous Pursuant to A.R.S. 13-604

[X] Nonrepetitive [ ] Repetitive Pursuant to A.R.S. 13-604

[ ] Nondangerous but Violative of A.R.S. 13-604.01(B) [ ] Dangerous and Violative of A.R.S. 13-604.01(A)

[ ] If Repetitive Per A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. ___ a Class ___ felony, nondangerous/dangerous, convicted in ___

2. ___ a Class___felony, nondangerous/dangerous, convicted in___

[ ] This sentence is to be concurrent with___

[ ] This sentence is to be consecutive with___

and the reasons therefore are stated by the Court on the record.

This sentence is to date from January 27, 1987. The Defendant is to be given credit for 323 days served prior to sentencing.

MINUTE ENTRY
JEFFREY ALAN WALTON

Page No. 4 Date January 27, 1987 Case No. CR-17537

As to counts Two, Three and Four,

THE COURT FINDS the same aggravating circumstances. In addition thereto,

THE COURT FINDS the following aggravating circumstances:

Prior felony conviction; traumatic anxiety and loss caused to the victim's family; defendant's failure to benefit from prior rehabilitative efforts in his behalf.

THE COURT FINDS a significant danger to the community, therefore.

Sharon Cottrell
Deputy Clerk

Div XVI Date January 27, 1987 Judge or Commissioner THOMAS MEEHAN Deputy Sharon Cottrell

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count Two, ARMED ROBBERY

FELONY CLASS: 2

IN VIOLATION OF A.R.S. SECTIONS: 13-1902; 13-1904(A)(1) and (B); 13-604(G)

DATE OF OFFENSE: 3/2/86

SENTENCE: twenty-one (21) years

[ ] Mitigated [ ] Presumptive [X] Aggravated

[ ] Nondangerous [X] Dangerous Pursuant to A.R.S. 13-604

[X] Nonrepetitive [ ] Repetitive Pursuant to A.R.S. 13-604

[ ] Nondangerous but Violative of A.R.S. 13-604.01(B)

[ ] Dangerous and Violative of A.R.S. 13-604.01(A)

[ ] If Repetitive Per A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. ___ a Class___felony, nondangerous/dangerous, convicted in___

2. ___ a Class___felony, nondangerous/dangerous, convicted in___

[ ] This sentence is to be concurrent with___

[X] This sentence is to be consecutive with Count One

and the reasons therefore are stated by the Court on the record.

This sentence is to date from completion of sentence in Count One. The Defendant is to be given credit for___ days served prior to sentencing.

Div XVI Date January 27, 1987 Judge or Commissioner THOMAS MEEHAN Deputy Sharon Cottrell

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count Three, KIDNAPPING

FELONY CLASS: 2

IN VIOLATION OF A.R.S. SECTIONS: 13-1304(A)(3) and (B); 13-604(G)

DATE OF OFFENSE: 3/2/86

SENTENCE: twenty-one (21) years

[ ] Mitigated [ ] Presumptive [X] Aggravated

[ ] Nondangerous [X] Dangerous Pursuant to A.R.S. 13-604

[X] Nonrepetitive [ ] Repetitive Pursuant to A.R.S. 13-604

[ ] Nondangerous but Violative of A.R.S. 13-604.01(B)

[ ] Dangerous and Violative of A.R.S. 13-604.01(A)

[ ] If Repetitive Per A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. ___ a Class___felony, nondangerous/dangerous, convicted in___

2. ___ a Class___felony, nondangerous/dangerous, convicted in___

[X] This sentence is to be concurrent with Count Two

[X] This sentence is to be consecutive with Count One

and the reasons therefore are stated by the Court on the record.

This sentence is to date from completion of sentence in Count One. The Defendant is to be given credit for___ days served prior to sentencing.

Div XVI Date January 27, 1987 Judge or Commissioner THOMAS MEEHAN Deputy Sharon Cottrell

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

OFFENSE: Count Four, THEFT BY CONTROL OVER $1,000.00

FELONY CLASS: 3

IN VIOLATION OF A.R.S SECTIONS: 13-1802(A)(1) and (C); 13-604

DATE OF OFFENSE: 3/2/86

SENTENCE: ten (10) years

[ ] Mitigated [ ] Presumptive [X] Aggravated

[X] Nondangerous [ ] Dangerous Pursuant to A.R.S. 13-604

[X] Nonrepetitive [ ] Repetitive Pursuant to A.R.S. 13-604

[ ] Nondangerous but Violative of A.R.S. 13-604.01(B)

[ ] Dangerous and Violative of A.R.S. 13-604.01(A)

[ ] If Repetitive Per A.R.S. 13-604, the Court finds that the Defendant was previously convicted of the following felonies:

1. ___
a Class___felony, nondangerous/dangerous, convicted in___

2. ___
a Class___felony, nondangerous/dangerous, convicted in___

[X] This sentence is to be concurrent with Counts Two and Three

[X] This sentence is to be consecutive with Count One

and the reasons therefore are stated by the Court on the record.

This sentence is to date from completion of sentence in Count One. The Defendant is to be given credit for___ days served prior to sentencing.

MINUTE ENTRY
JEFFREY ALAN WALTON

Page No. 8 Date January 27, 1987 Case No. CR-17537

IT IS ORDERED that Thomas Higgins be withdrawn as attorney of record.

IT IS FURTHER ORDERED Harold Higgins be pointed to represent defendant on appeal.

Sharon Cottrell
Deputy Clerk

Div XVI Date January 27, 1987 Judge or Commissioner THOMAS MEEHAN Deputy Sharon Cottrell

No. CR-17537

STATE VS. JEFFREY ALAN WALTON

The Defendant is advised concerning rights of appeal and written notice of those rights is provided.

[ ] ORDERED exonerating any bond.

[ ] ORDERED granting the State's Motion to Dismiss

—

ORDERED authorizing the Sheriff of Pima County to deliver the Defendant to the custody of the Arizona Department of Corrections and authorizing the Department of Corrections to carry out the term of imprisonment set forth herein.

ORDERED that the Clerk of the Court shall remit to the Department of Corrections a copy of this order together with all pre-sentence reports, probation violation reports, medical and psychological reports relating to the Defendant and involving this cause.

Let the record reflect that the Defendant's fingerprint is permanently affixed to this sentencing order in open Court.

FILED: Notice of Rights of Appeal, signed by the Defendant.

[X] ISSUED: Order of Confinement

10:00 a.m. Hearing concludes.

/s/ illegible
JUDGE OF THE SUPERIOR COURT

cc: County Attorney (3)
Thomas Higgins, Esq.
Harold Higgins, Esq.

Department of Corrections - 3 certified
Arizona Supreme Court, Phoenix AZ
Sheriff - 3 certified
Adult Probation - 1 certified
Appeals
Hon. John G. Hawkins
Hon. Thomas Meehan
Court Administrator
[Signature Security (fingerprint) Identiprint]

STATE of Arizona, Appellee,

v.

Jeffrey Alan WALTON, Appellant.

No. CR-87-0022-AP.

Supreme Court of Arizona,
En Banc.

Feb. 2, 1989.

HOLOHAN, Justice (Retired).

The defendant, Jeffrey Walton, was convicted of first degree murder, armed robbery, kidnapping, and theft by control for abducting, robbing and killing Thomas Powell. He was sentenced to death on the murder conviction and to prison terms on the noncapital felony convictions, to be served consecutively to the death sentence.

The facts developed at trial are that the defendant and his two co-defendants, Robert Hoover and Sharold Ramsey, had planned to rob at gunpoint some "old man that was drunk," take his car, tie him up, and leave him in the desert area outside of Tucson while they fled from the state in his vehicle. Instead, they encountered a young marine, Thomas Powell, in a bar parking lot. They took his wallet and keys and forced him into his car with them. They then proceeded out of the city on Speedway Boulevard to Gates Pass where they pulled off the road in a secluded spot. Having no materials suitable for tying up Powell, they forced him to lie face down on the ground while they debated his fate. Ultimately, the defendant took the gun and marched Powell into the darkness, leaving the other two in the car. The defendant instructed the co-defendants to "to turn up the radio." After a short walk, the defendant again forced Powell to lie prone on

the ground; he shot the victim once in the head and hurried back to the vehicle.

The victim had been rendered unconscious and blind by the shot, but he eventually regained consciousness. Weakened and hampered by his blindness, he floundered in the desert. Approximately a week after the shooting, the victim died from exposure and pneumonia.

Soon after the killing, the defendant asked David Bilodeau for dynamite to destroy the victim's car, explaining that he had killed someone and needed to dispose of evidence. Mr. Bilodeau promptly related this information to police who eventually arrested the trio. The defendant gave the police a statement and led them to the murder area where they found Powell's body less than a day after he had succumbed.

We have jurisdiction pursuant to art. 6, § 5(3) of the Arizona Constitution and A.R.S. § 12-102 and § 13-4031. We affirm the conviction of guilt and sentences on all counts.

The defendant presents twenty-seven issues for our review. For the sake of brevity, we consolidate those into the following issues:

I. Rule 11: Whether the defendant should have had greater opportunity to develop evidence of incompetence despite a pre-Rule 11 screening indicating no incompetence.

II. Election of Murder Theories: Whether the state should have elected between premeditated and felony murder theories.

III. Voluntariness of Statement: Whether the defendant had voluntarily rendered his statement to the police.

IV. Voir Dire: Whether the jury had been impermissibly tainted by pretrial publicity and the judge's comment at voir dire.

V. Evidence: Whether the judge erred in evidence admissibility rulings.

VI. Jury Instructions: Whether the judge erred in instructing the jury.

VII. Death Sentence: Whether the Arizona death penalty is unconstitutional, and it was properly applied by the trial court when sentencing the defendant to death.

VIII. Prison Term Sentences: Whether the trial court erred in imposing prison terms on the noncapital offenses consecutive to the death sentence, and whether the trial court erred in considering the impact of those offenses on the victim's family to aggravate the prison sentences.

IX. Ineffective Assistance of Counsel: Whether the defendant's attorney provided ineffective assistance.

I. RULE 11

Defendant first contends that the trial court erred when it denied his request for a Rule 11 competency evaluation and continuances to develop evidence of incompetency and insanity.

A. *Rule 11 Evaluation*

Rule 11.1, Arizona Rules of Criminal Procedure, provides that the state shall not try anyone who is "unable to understand the proceedings against him or to assist in his own defense." If a defendant appears incompetent, any party may request a competency examination. 17 A.R.S., Rules of Crim.Proc., Rule 11.2. Pursuant to Rule 11.3, if the trial court determines that reasonable grounds exist for an examination, mental health experts are appointed to examine the defendant. Prior to making the determination whether reasonable grounds exist, the trial judge may order a preliminary evaluation of the defendant. *State v. Johnson*, 147 Ariz. 395, 398-99, 710 P.2d 1050, 1053 (1985).

In the present case, the court ordered a preliminary evaluation of the defendant by Dr. Hinton, a psychologist with the Pima County Court Clinic. Dr. Hinton reported that the defendant displayed no signs of incompetence nor insanity. The trial court therefore concluded that there was no reasonable grounds for a Rule 11 examination. Under similar circumstances, we have held that the report of the psychologist was "more than sufficient . . . to base a conclusion that defendant could assist in the preparation of his defense," hence the trial court did not abuse its discretion when it denied the motion for a Rule 11 examination. *State v. Borbon*, 146 Ariz. 392, 395, 706 P.2d 718, 721 (1985).

After the denial of the motion for mental examination, the defendant made several additional requests for a Rule 11 examination. However, the only showing made by the defense was the existence of a childhood history of

psychiatric referrals and some blackouts caused by substance abuse. The trial court ruled, and we agree, that these matters were not relevant to show present incompetence to stand trial. Nonetheless, the defendant persistently argued that the trial court should treat amnesia and a history of substance abuse as evidence of incompetence. The trial court declined to accept the defense's theory. We find no abuse of discretion in the trial court's rulings.

In addition, the defendant also wanted a Rule 11 evaluation to provide him with evidence bearing on his insanity at the time of the offense. However, he never gave notice, as required by Rule 15.2(b), Ariz.R.Crim.P., that he would allege an insanity defense, nor did a subsequent mental examination conducted prior to sentencing disclose any basis for an insanity defense. The defense was not entitled to expert assistance on a defense he had no intention or basis to use. Therefore, we hold that the trial judge did not err by refusing to grant a Rule 11 examination.

B. *Continuances*

On several occasions, the defendant sought continuances to develop evidence of incompetence or insanity related to his history of substance abuse and speculated mental illness. The court granted the defense counsel's first motion for continuance to allow him additional time for trial preparation. The trial court also ordered a preliminary mental evaluation of the defendant. After the examination and report by Dr. Hinton, subsequent

motions for continuances to develop evidence of insanity were denied.

As noted above, the defendant is not entitled to continuances to gather evidence of insanity when he has not sought an insanity defense. Moreover, because the evidence he hoped to develop during continuances (memory impairment) is immaterial to his present competency and guilt, *People v. Amador*, 200 Cal.App.3d 1449, 246 Cal. Rptr. 605 (1988), the trial judge did not abuse his discretion in denying the second and subsequent requests for continuances.

II. ELECTION OF MURDER THEORIES

Defendant next contends that the trial court erred when it refused to force the state to elect between premeditated and felony murder in trying him for first degree murder. The defense contends that the jury might have been confused by two theories, and defense counsel states that he encountered difficulty in preparing cross-examination strategy.

Initially we note that in *State v. Encinas*, 132 Ariz. 493, 647 P.2d 624 (1982), we held that first degree murder is a single crime whether it is tried on the ground of felony murder, premeditation, or both. *id.*, 132 Ariz. at 496, 647 P.2d at 627. Therefore, the state was not required to elect between the two methods of committing first degree murder.

We turn to the defendant's specific complaints. First, speculation about "*potential* confusion among jurors" is insufficient to establish actual jury confusion. Second, the

defense counsel has not provided us with any legal authority that supports his proposition that due process should relieve him of the burden of complex trial strategies. Counsel cannot complain that preparing for felony murder as well as premeditated murder placed an undue burden on him when he had to prepare a defense against the felony charges alleged in the indictment, two of which were underlying felonies for the murder charge. He was not forced to choose between theories either, rather then simply prepare to defend against several theories. We therefore hold that the trial court did not err when it refused to order the state to elect to try the case on only one theory for first degree murder.

III. VOLUNTARINESS OF STATEMENTS

The defendant next contends that the trial court erred when it denied his motion to suppress statements he made during police interrogation. In support of his fifth amendment claim, defendant refers the court to three statements made by the detective:

1) "It's nothing that can't be worked out,"
2) "to lie isn't going to help," and
3) "Give yourself a chance."

He asserts that those statements constituted promises which overbore his will, rendering his subsequent confession involuntary.

To determine the voluntariness of a confession, the court must evaluate the "totality of the circumstances" surrounding the confession. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854

(1973); *Fikes v. Alabama*, 352 U.S. 191, 197, 77 S.Ct. 281, 284, 1 L.Ed.2d 246 (1957). The "totality of the circumstances" test is a highly fact-intensive test. Courts applying that test must consider details of interrogation, the specific police tactics, and the suspect's personal characteristics. *Rachlin v. United States*, 723 F.2d 1373, 1377 (8th Cir. 1983). The crucial issue is whether police conduct overbore a suspect's will. *Leyra v. Denno*, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954).

The Supreme Court has held that confessions extracted by threats or violence, or direct or implied promises, are involuntary. *Brady v. United States*, 397 U.S. 742, 753, 90 S.Ct. 1463, 1471, 25 L.Ed. 2d 747 (1970); *Malloy v. Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964); *Bram v. United States*, 168 U.S 532, 542-43, 18 S.Ct. 183, 187, 42 L.Ed. 568 (1897). Thus, even without making an express promise, police who imply a benefit to the suspect in exchange for his information will not be permitted to introduce the resulting confession at trial. *State v. Burr*, 126 Ariz. 338, 340, 615 P.2d 635, 637 (1980); *State v. McFall*, 103 Ariz. 234, 236, 439 P.2d 805, 807 (1968). Nonetheless, police may use less egregious psychological tactics to obtain confessions. *See Haynes v. Washington*, 373 U.S. 503, 514-15, 83 S.Ct. 1336, 1343-44, 10 L.Ed.2d 513 (1963).

Preliminarily, we turn to the latter two challenged statements: "give yourself a chance," and "to lie isn't going to help." Because they are no more than the detective's opinion and advice, those statements do not evoke fifth amendment protections. *See State v. McVay*, 127 Ariz. 18, 20, 617 P.2d 1134, 1136 (1980) (a statement couched in terms of an opinion is insufficient to render a confession

involuntary); *Laub v. State*, 24 Ariz. 175, 177, 207 P. 465, 466 (1922) (the mere statement that it would be better to tell the truth does not render the confession involuntary); *State v. Hall*, 120 Ariz. 476, 479, 586 P.2d 1288, 1291 (App. 1978) (an officer's advice that telling the truth would have favorable impact on the suspect's sentence did not render the ensuing confession involuntary). Therefore, the latter two statements do not constitute impermissible promises or threats that implicate fifth amendment rights.

Next we note that "it's nothing that can't be worked out" clearly is not an express promise because it did not offer a benefit in exchange for information. *Accord Burr*, 126 Ariz. at 340, 615 P.2d at 637. Nonetheless, the defendant asserts that phrase constitutes an impermissible implied promise. *See id*, 126 Ariz, at 340, 615 P.2d at 637. We examine the context in which the police made that statement, the "totality of the circumstances," *Schneckloth*, 412 U.S. at 226-27, 93 S.Ct. at 2047-48, for guidance.

The detective had interrogated the defendant for approximately 45 minutes before he began to confront him with information about the murder. After less than a minute of detailing facts of the incident, the detective stated:

> "It's like I told you, you know, it's heavy and it's nothing that can't be worked out. You don't seem like the type of man who is going to try to run from a misstake [sic]. I want you to tell us the truth and to get it off your chest."

As the detective pressed him with more specific questions, the defendant persistently denied any participation in and knowledge of the crime, and offered an alibi. With continued probing, however, the defendant

gradually changed his claim from noninvolvement to not remembering the incident. That, too, slowly gave way as the defendant began to "remember" some collateral information. Then he broke into tears and took a break.

The detective resumed confronting him with details of the crime until the defendant, again reduced to tears, began to remember minor details directly related to the incident. Approximately forty minutes lapsed between when the detective said that it can be worked out and when the defendant began to admit incriminating details; over the next two-hour period, the defendant gradually revealed more.

It is clear from the context of the whole interrogation that the defendant did not respond to the statement as if he understood it to be a promise. Instead, for approximately 45 minutes afterward, he continued to deny any involvement in the incident. When he at length offered some information, he did so not in response to a promise, but due to the continued confrontation with known details and the effect that had on his guilt or fear of retribution, compounded by the need to provide more facts to extricate himself after he had implicated himself. In *Hall*, we held that the defendant must have relied on the promise before we will find his statement involuntary. 120 Ariz. at 457, 586 P.2d at 1269. From the context of this interrogation, it is clear that the statement of the detective did not constitute a promise. The actions of the defendant show that he did not treat the detective's statement as a promise. Therefore by saying, "it's nothing that can't be worked out," the detective did not render the defendant's subsequent statement involuntary.

Having examined the entire record, *Davis v. North Carolina*, 384 U.S. 737, 741-42, 86 S.Ct. 1761, 1764, 16 L.Ed.2d 895, 898 (1966), and considered the totality of the interrogation, *Schneckloth*, 412 U.S. at 226-27, 93 S.Ct. at 2047-48, we find that the three statements were not promissory in nature, and they did not induce the defendant to make a statement. The defendant's fifth amendment rights were not violated, and the trial court did not err when it refused to suppress the defendant's statements.

IV. VOIR DIRE

The defendant next contends that the trial court erred when it denied his request to declare a mistrial after voir dire. He bases his claim on two circumstances: (1) thirteen prospective jurors indicated some exposure to the case through the media; and (2) the judge commented that sitting on this jury would probably upset a prospective juror whose cousin had been murdered by the Tison gang.

A. *Pretrial Publicity*

It is not whether prospective jurors have heard of the crime, but their prior exposure to information about the crime that is the important factor in the defendant's right to an impartial jury. Prior knowledge of a case alone is insufficient to disqualify a juror. *State v. Chaney*, 141 Ariz. 295, 302, 686 P.2d 1265, 1272 (1984). A trial court can strike a panel due to exposure to pretrial publicity only when the defendant has shown that the jurors "have formed preconceived notions concerning the defendant's guilt and that they cannot lay those notions aside." *Id.*

(citing *State v. Mulligan*, 126 Ariz. 210, 214, 613 p.2d 1266, 1270 (1980)). A defendant must show that the jury was actually prejudiced by pretrial publicity, or that the publicity was so outrageous that prejudice could be assumed. *Murphy v. Florida*, 421 U.S. 794, 800-803, 95 S.Ct. 2031, 2036-38, 44 L.Ed.2d 589 (1975); *State v. Joseph Smith*, 123 Ariz. 231, 236, 599 P.2d 187, 192 (1979).

The court impaneled only three of the thirteen jurors who had been exposed to information about the crime, and each of the impaneled jurors stated that they could set that knowledge aside in reaching a verdict. The defense made no showing that the statements of those jurors were not credible. The trial court did not err in denying a mistrial.

B. *Judge's Comment*

The judge asked prospective jurors whether they could put their personal feelings aside and decide the case based on the evidence and instructions. One prospective juror answered, "My cousihn [sic] and his wife were killed by the Tyson [sic] gang, and I think listening to this type of testimony it would bother me." The judge responded, "It is probably going to be upsetting," and excused her. The defendant contends that the judge thus informed jurors of his personal opinion of the aggravated nature of this case, severely prejudicing the defendant. We disagree.

The comment by the judge simply acknowledged his agreement that the juror's past experiences could interfere with her objectivity in a murder trial. The comment did not imply that the defendant was guilty or that the

crime charged was especially offensive. It was merely a sympathetic response to the obviously emotional condition of the prospective juror. The comment did not constitute error.

Additionally, we note that the defendant failed to object to the impaneling of the jury. In fact, he expressly approved the panel. If counsel had timely objected, the judge could, if necessary, have promptly corrected any error. Counsel must make his objection during voir dire or waive that right. *State v. Arnett*, 119 Ariz. 38, 50, 579 P.2d 542, 554. (1978). Moreover, he cannot object to the panel once he has approved it. *Id.* (citing *Glover v. State*, 273 Md. 448, 330 A.2d 201 (1975); *People v. Cobb*, 19 Ill.App.3d 520, 311 N.E. 2d 702 (1974)).

The trial court enjoys broad discretion in granting a mistrial, and we will reverse the lower court's ruling only if the court's conduct is palpably improper and clearly injurious. *State v. Coleman*, 122 Ariz. 130, 133, 593 P.2d 684, 687 (App.1978), *aff'd in part*, 122 Ariz. 99, 593 P.2d 653 (1979). The denial of the defendant's mistrial motion was not error.

V. EVIDENCE

The defendant next contends that the trial court's various rulings on admission of evidence and argument of counsel constituted error. Specifically, he complains of the court's following rulings: (1) it permitted the deceased's mother to testify; (2) it restricted the defendant's cross-examination of a witness' drug history; (3) it declined to declare a mistrial when the prosecutor extended his closing argument beyond the facts of the

case; (4) it admitted the murder weapon after closing arguments; and (5) it admitted Dr. Hinton's pre-Rule 11 screening report at the sentencing hearing.

A. *Testimony of the Victim's Mother*

Defense counsel filed a motion *in limine* to exclude Ms. Powell's testimony because it was irrelevant and would inflame the jury. He was especially concerned that she would testify about the victim's life and background, as well as here feelings about her son's murder, to garner sympathy. The prosecution summarized her expected testimony: she would testify that her son, a marine, was visiting her and asked to borrow her car to "go out to have a beer;" the description of her vehicle; describing his appearance when he left; waking up the next day and finding that he had not come home; calling the police and filing a missing persons report; that California authorities contacted her after finding her car in San Luis Obispo; finally, that she gave a statement to the Tucson police.

Defense counsel assented: "if they are going to do what they say, there's nothing of evidentiary value anyway and I will accept that." Ms. Powell's testimony subsequently conformed to that agreement, and the defendant has directed our attention to no testimony exceeding it. Therefore, the defendant cannot now complain that the trial court should have precluded that testimony. "[I]t can hardly be said that the court denied [the defendant] a right which [he] had waived." *Cobb*, 19 Ill.3d at 522, 311 N.E.2d at 704. Therefore, we find no error in the denial of the motion *in limine*.

B. *Cross-examination of Witness' Drug History*

The state called David Bilodeau to testify concerning admissions the defendant made to him. The witness had a lengthy history of substance abuse but was not under the influence of drugs at the time the defendant spoke to him. The state sought to exclude on relevancy grounds evidence of the witness' drug history beyond his use at the time when he heard the defendant's admissions. Defense counsel argued that the history was admissible to explain discrepancies in Mr. Bilodeau's testimony and impeach his memory, but made no offers of proof beyond bare speculation. The court granted the state's motion.

A trial court should admit relevant evidence but exclude that which has little probative value when it would confuse issues, unfairly prejudice the jury, or invade the witness' privacy. 17A A.R.S., Rules of Evid., Rule 403; *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982). A witness' ability to perceive or recall critical facts is highly relevant to his credibility. Nonetheless, a trial judge does not abuse his discretion when he excludes testimony about a witness' psychiatric history when the defendant fails to make an offer of proof that the witness' perception or memory was affected by his illness. *Id.*, 134 Ariz. at 513, 658 P.2d at 166-67.

Contrary to the state's assertion, because the evidence of Mr. Bilodeau's drug use history might affect his ability to accurately perceive and remember the defendant's statements, it could be relevant. Nevertheless, as in *Zuck*, the defendant failed to show that it would indeed be relevant through an offer to prove how it impaired his memory and perception. Without some basis to believe

that Mr. Bilodeau's substance abuse affected him at the time, the trial court did not abuse its discretion when it granted the state's motion in limine.

C. *Closing Argument Exceeding the Facts*

In the rebuttal part of his closing argument, the prosecutor said,

> Sometimes sitting at the prosecution table and listening to the defense attorney testify is one of the more difficult things we have to do, frankly. . . .If you come down here when you are done with your service in this case, come down to the Courthouse and watch some trials in progress, you will get a chance to hear much of what's just been said to you by [defense counsel] . . . I'm sick to death of coming in here and on just about every trial listening to allegations about prosecutorial misconduct, police misconduct, witnesses lying, making up stories, a deal bringing somebody to fit in; you can do what you want in every case you hear.

By complaining of defense attorneys' tactics of displacing blame, and inviting the panel to attend other trials where it would hear reiterations of those arguments, the prosecutor exceeded the facts and law of the case at hand. Counsel should confine his argument to the pertinent law and facts of the case. *State v. Merryman*, 79 Ariz. 73, 75, 283 P.2d 239, 241 (1955). When he referred the jury to other cases, the prosecutor exceeded the limits of proper argument.

However, the defendant never objected to the argument. When counsel fails to object at trial, he is precluded from raising the matter on appeal unless the error is

fundamental. *State v. Stoneman*, 115 Ariz. 594, 596, 566 P.2d 1340, 1342 (1977). Fundamental error affects the foundation of the case or deprives the defendant of a right essential to his defense. *State v. Gamble*, 111 Ariz. 25, 26, 523 P.2d 53, 54 (1974).

The prosecutor's frustration with defense attorneys' strategies does not rise to the level of fundamental error. It neither affects the merits of the case nor deprives the defendant of an essential right. Therefore, absent an objection, counsel is precluded from raising this matter on appeal. *Stoneman*, 115 Ariz. at 596, 566 P.2d at 1342. The defendant nonetheless asserts that the court should have declared a mistrial on its own motion. Because the error was not fundamental, the court was not obligated to declare a mistrial.

D. *Murder Weapon*

At trial, the state sought to introduce the murder weapon into evidence before it had established sufficient foundation. Upon objection, the court denied the request. The state later cured the foundation defects but forgot to have the weapon admitted into evidence. Realizing its mistake after closing arguments, the state requested and the court allowed admission of the weapon. The defendant complains that the foundation was still inadequate when the weapon was admitted, and he was prejudiced by drawing the jury's attention to the weapon just prior to deliberations.

Courts have broad discretion in permitting a party to reopen a case for admission of evidence. *State v. Taylor*, 112 Ariz. 68, 83, 537 P.2d 938, 953 (1975), *cert. denied*, 424

U.S. 921, 96 S.Ct. 1127, 47 L.Ed.2d 328 (1976). They do not abuse that discretion when they allow the state to reopen even after both sides have rested, as long as the state acts in good faith, and the result does not prejudice the defendant. *See State v. Thomas*, 110 Ariz. 120, 131, 515 P.2d 865, 876-77 (1973); *State v. Mendoza*, 109 Ariz. 445, 447-48, 511 P.2d 627, 630 (1973).

Reviewing the record, we disagree with the defendant's contention that the foundation was inadequate. The defendant stipulated to the foundation for admitting the gun into evidence, so he cannot now complaint of insufficient foundation.

The only remaining question is whether the court should have excluded the weapon due to the delayed request for its admission. The trial judge properly exercised his discretion when he found that the state's tardiness was a product of simple inadvertence, not bad faith. In addition, the only prejudice the defendant alleges is that the weapon inflamed the jury just prior to deliberations. However, the jury had already retired before the state made its motion to admit the weapon; hence, the jury could hardly have been affected by it. Therefore, the trial court did not abuse its discretion when it admitted the murder weapon into evidence after closing argument.

E. *Pre-Rule 11 Screening Report*

At the sentencing hearing, the court considered Dr. Hinton's pre-Rule 11 screening report in mitigation. The report contained information supporting several of the factors that the defendant asserted in mitigation. For example, it related serious personal problems that

affected the defendant while he was growing up, and it recounted his substance abuse and psychiatric treatment histories. In particular, Dr. Hinton concluded that drug use probably reduced the defendant's judgment and compromised his impulse control to some extent at the time of the offense. Thus, the report presented important information of mitigating circumstances.

The defendant complains that admitting the report violated the foundation and hearsay rules of evidence. However, information relevant to mitigation can be presented at a sentencing hearing without regard to its admissibility under the rules of evidence for criminal trials. A.R.S. § 13-703(C). The defendant's assertion, therefore, has no merit. We therefore hold that the trial court did not abuse its discretion when it made the foregoing evidentiary rulings.

VI. JURY INSTRUCTIONS

The defendant next contends that the trial court erred in three of its rulings concerning jury instructions. He alleges that the judge: (1) should not have instructed the jury to disregard codefendants' roles in the crime; (2) should have included a "lack of flight" instruction; and (3) should have added commentary instructing the jury that the two theories for first degree murder constitute alternate grounds.

A. *Codefendants' Roles*

The defendant alleges that because his defense was that his codefendant fired the fatal shot, the court should

not have instructed the jury to disregard other participants' role in the crime. The court instructed the jury as follows:

> It is no defense to the crimes charged against the defendant in this case that one or more other persons not now on trial might have also participated or cooperated in the crimes thus charged. The jury is not to speculate upon or even to consider the reasons for the absence from the Courtroom of such other persons if any. As the only matter before you for decision is the guilt or innocence of this particular defendant.

This instruction is a slight variation of R.A.J.I. No. 3.04 (1974).

We have previously determined that the identical instruction that the trial judge gave in this case should not be excluded based upon the theory that someone else committed the crime. *See State v. Cannon*, 148 Ariz. 72, 79, 713 P.2d 273, 280-81 (1985). We find no significant differences in the facts of the present case that persuades us to change our position in *Cannon*. We find no error.

B. *Lack of Flight*

The defendant alleges that the court should have given the jury his "lack of flight" instruction so that the jurors could have considered his lack of flight in their deliberations. The trial court refused the defense instruction.

Although flight is relevant to guilt, it does not necessarily follow the lack of flight is relevant to innocence. In an analogous case, we noted:

> Instructions on flight seem to be premised on " . . . the supposition that with a consciousness of guilt, 'the wicked flee when no man pursueth' to avoid punishment," as observed by this Court through Justice Lorna E. Lockwood in *State v. Owen*. [citations omitted] Considering the rest of the proverb, " . . . but the righteous are bold as a lion," it would seem to follow that boldness infers innocence. Contemplated, however, is the state of mind of the guilty and the innocent. Verily, flight to escape detection or capture is circumstantial evidence of guilt. Absence of flight under other circumstances may seem far better calculated to avoid detection. Absence of flight does not necessarily reflect the state of mind. Would that detection of criminals were so simple.

State v. Sorensen, 104 Ariz. 503, 509, 455 P.2d 981, 987 (1969). In accordance with our holding in *Sorenson*, we find that the trial court committed no error when it denied a lack of flight instruction.

C. *Alternate Murder Grounds*

The defendant asserts that the trial court should have added a sentence instructing jurors that felony murder was an alternate theory to premeditated murder. He wanted only "some minimal instruction."

The instructions must be read as a whole to determine whether they adequately reflect the law. *State v. Haas*, 138 Ariz. 413, 425, 675 P.2d 673, 685 (1983). Moreover, if the instructions as a whole properly reflect the law in Arizona, *State v. Richardson*, 110 Ariz. 48, 50, 514 P.2d 1236, 1238 (1973), *cert. denied*, 415 U.S. 929, 94 S.Ct. 1439, 39 L.Ed.2d 487 (1974), and are "substantially free

from error," *State v. Norgard*, 103 Ariz. 381, 383, 442 P.2d 544, 546 (1968), the defendant suffers no prejudice by their wording.

In the instant matter, the court presented the appropriate felony and premeditated murder instructions separately, as different grounds for a first degree murder conviction, but omitted the defendant's requested commentary. Because the instructions properly reflected Arizona law, the trial judge was not required to supplement them with the defense's commentary.

Moreover, we note that the jury was aware that the two theories of murder constituted alternate grounds. The prosecutors, in both closing statements as well as opening remarks, explained in detail the two theories *as alternative* means of finding the defendant guilty.

VII. DEATH SENTENCE

A. *Constitutionality*

The defendant next contends that the Arizona death penalty procedure is unconstitutional because: (1) it is facially invalid as cruel and unusual punishment; (2) it denies him his right to jury trial by making the judge the trier of fact at sentencing; (3) it impermissibly places the burden of proof of mitigation on the defendant; (4) it does not require proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating ones; (5) it provides inadequate standards to measure the weigh (sic) to assign aggravating and mitigating factors; (6) its aggravating circumstance of "especially heinous, cruel or depraved" conduct is vague; (7) it restricts the judge's

discretion by mandating capital sentencing when the judge makes certain findings; and (8) it fails to require the judge to enter a "special verdict" explaining each of his findings in detail.

We have previously considered and rejected the first seven arguments and see no reason to change our position. *See State v. Richmond (Richmond I)*, 114 Ariz. 186, 194-95, 560 P.2d 41, 49-50 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977) (death penalty is not cruel and unusual); *State v. Correll*, 148 Ariz. 468, 483-84, 715 P.2d 721, 736-37 (1986) (denial of jury sentencing, burden of proving mitigation on the defendant, no proof beyond a reasonable doubt that aggravation outweighs mitigation, and inadequate standards to weigh the factors are not unconstitutional); *State v. Ortiz*, 131 Ariz. 195, 206, 639 P.2d 1020, 1031 (1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982), *rev'd on other grounds*, *State v. Gretzler*, 135 Ariz. 42, 57 n. 2, 659 P.2d 1, 16 n. 2, *cert. denied*, 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983), ("heinous, cruel, or depraved" factor is not unconstitutionally vague); *State v. Bracy*, 145 Ariz. 520, 536, 703 P.2d 464, 480 (1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 898, 88 L.Ed.2d 932 (1986) (restricting judge's sentencing discretion is not unconstitutional).

We have not previously addressed the defendant's final constitutional challenge to the death penalty: that the judge's failure to specify the basis for his findings in greater detail than is required in A.R.S. § 13-703(D) violates the defendant's right to due process. The sentencing statute already requires the judge to return a special verdict setting forth the existence or nonexistence of the

aggravating and mitigating factors listed in the statute. *See* A.R.S. § 13-703(D).

In the present matter, the judge fully complied with that statute. The defendant nonetheless complains that the judge should have set forth the basis for the findings in greater detail as did the judge in *State v. Ceja*, 126 Ariz. 35, 37-39, 612 P.2d 491, 493-95 (1980). We are not persuaded. Although we applaud the meticulous detail the judge applied in sentencing Ceja, we hold that due process requires no more than a clear listing of the factors involved; the defendant's novel claim does not rise to the level of constitutional error.

B. *Enmund/Tison Findings*

Because the jury entered a general verdict of guilty of first degree murder without specifying whether they based it on premeditated or felony murder, the defendant challenges the judge's *Enmund/Tison* finding. He alleges that the trial court misapplied the Supreme Court's test for felony murder sentencing set forth in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and clarified in *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). Underlying that allegation is his contention that it was his codefendant, Robert Hoover, who actually shot the victim while the present defendant, who never intended that the victim be killed, simply waited in the car. The defendant therefore applies the *Tison* rule to his version of the facts and concludes that the trial court erred.

When the state advances both premeditated and felony murder theories, and the jury renders a general verdict of guilty, the judge must apply the *Enmund* test for felony murder in addition to the sentencing statute criteria for other grounds of murder to reach a capital sentence. *See State v. McDaniel*, 136 Ariz. 188, 199, 665 P.2d 70, 81 (1983). Thus, he must decide whether the defendant killed, attempted to kill, or intended to kill, as well as find one or more aggravating and no outweighing mitigating factors.[1]

In the instant case, however, the trial judge rejected the defendant's contentions that it was not he, but his codefendant, who killed the victim. The judge found that the defendant was "the person that took the deceased Mr. Powell into the desert, put a gun to his head which resulted in his subsequent death." That finding was

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[1] The defendant also contends that the judge erred when he refused to admit at sentencing the jury foreman's testimony that the jury convicted on the basis of felony, not premeditated, murder. The defendant fails to explain how this affected his eighth amendment rights; presumably he sought that evidence to force the court to apply the *Enmund* test based on the theory the jury used to convict. Because the jury's grounds for conviction are irrelevant to the judge's *Enmund* findings, *Cabana v. Bullock*, 474 U.S. 376, 383, 106 S.Ct. 689, 695-96, 88 L.Ed.2d 704 (1986), the judge did not have to admit evidence of the jury's deliberations.

The defendant further contends that the trial court violated *Enmund* when it sentenced him to death after the jury had been instructed concerning accomplice liability. However, it is not the *jury's* grounds for conviction, but the *judge's* grounds for sentencing that must meet the *Enmund* test. Thus by giving that jury instruction, the judge did not implicate the *Enmund* test at all.

based on substantial evidence. *See id.*, 136 Ariz. at 199, 665 P.2d at 81.

In his statement to the police, the defendant admitted his participation throughout the incident, but credited Hoover with the killing. However, codefendant Sharold Ramsey testified that it was the defendant who took Powell at gunpoint into the desert. Before leaving, the defendant told the others to turn up the radio. He returned approximately five minutes later without Powell, commenting "that was loud," referring to the gunshot. Later, the defendant stated that he should have checked Powell's pulse, but he was sure that Powell was dead because he shot him in the head.

The defendant attempted to impeach Ramsey's testimony by showing that her self-interest and interest in protecting her lover, Hoover, motivated her to lie about who committed the killing. Nonetheless, her story was largely corroborated by David Bilodeau who reported the murder to the police well before the police found and questioned Ramsey.

The defendant attempted to impeach Bilodeau's testimony by showing his interest in receiving favorable treatment from federal authorities in an unrelated matter. The defense presented the inconsistencies between Bilodeau's original statement to the police that the defendant had stated to him, "we killed," and his trial testimony in which he stated that the defendant had stated, "I killed," Bilodeau's pending federal prosecution may have provided an incentive for his *report* of the incident, but the *substance* of the report was substantially consistent with Ramsey's version of the facts.

Having reviewed the record, we find substantial evidence to support the trial judge's finding that the defendant killed the victim. Therefore, the trial judge, following the procedure in *McDaniel*, did not err in making the *Enmund* finding.

C. *Independent Review of Sentence*

Our task is to scrutinize the facts of the present case to determine whether the trial judge erred in his special verdict on the aggravating and mitigating findings.

1. Aggravating Circumstances

The trial judge found two aggravating factors: the defendant committed the offense in an especially heinous, cruel, or depraved manner, and he did so for pecuniary gain. We independently review the record to determine whether the facts establish the presence or absence of the aggravating factors to sustain the imposition of a death sentence. *Richmond I*, 114 Ariz. at 196, 560 P.2d at 51. We must further ensure that aggravating factors were proven beyond a reasonable doubt and all appropriate mitigation was considered. *State v. LaGrand*, 153 Ariz. 21, 34, 734 P.2d 563, 576, *cert. denied*, ___ U.S. ___, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). We consider the aggravating circumstances separately.

a. *Especially Heinous, Cruel or Depraved*

First, a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death. *Correll*, 148 Ariz.

at 479-80, 715 P.2d at 733; *Gretzler*, 135 Ariz. at 51, 659 P.2d at 10. Mental anguish includes a victim's uncertainty as to his ultimate fate. *Correll*, 148 Ariz. at 480-81, 715 P.2d at 733; *State v. McCall*, 139 Ariz. 147, 161, 677 P.2d 920, 934 (1983), *cert. denied*, 467 U.S. 1220, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1984). For instance, in *Correll*, armed assailants bound the victims and drove them into the desert. We recognized that

> this must have caused each victim great distress. This fear and worry must have greatly increased when they were loaded into Cady's car and driven into the desert. At no time could they be certain what these two armed men intended beyond robbery.

148 Ariz. at 480, 715 P.2d at 733.

In the present case, we find ample evidence that Powell suffered substantial mental anguish prior to his death. As in *Correll*, armed assailants abducted and drove him out to a remote area of the desert at night. Powell could not be certain of his fate, but as the city lights grew dim behind him, his fears for his life must have multiplied. He was so clearly terrified by the time they stopped that Sharold Ramsey tried to reassure him that they would not hurt him.

But even if Powell took temporary refuge in her assurances, he soon realized that they meant to kill him. The defendant and Hoover forced Powell to lie face down on the ground outside the car while they argued over his fate. Although they had agreed to tie him up, the defendant, armed only with a gun but no rope to tie him, marched Powell off into the darkness, telling his companions to turn up the radio. The implication was clear to

Powell, who was so upset that he urinated on himself and begged the defendant not to kill him. This evidences that Powell suffered great mental mental anguish both during the car ride when his fate was uncertain and in his final march into the desert when his fate had become certain.

The state also asserts that a finding of especial cruelty can be based upon Powell's physical anguish from the wound, exposure, and conscious suffering in the desert. We have previously indicated that it is the foreseeability of causing the victim physical suffering after inflicting the mortal blow, rather than what surprisingly transpired subsequently, that guides our analysis. *See State v. Bernard Smith*, 146 Ariz. 491, 504, 707 P.2d 289, 302 (1985). In the present case, the defendant placed the gun to Powell's head, held his head immobile, and pulled the trigger, intending to kill the victim immediately. Because Powell's survival and longevity were neither reasonably foreseeable nor intended, his physical suffering falls outside the definition of cruelty as outlined by this court. *See id.*, 146 Ariz. at 504, 707 P.2d at 302. The trial court's finding of cruelty is supported by the mental torment of the victim prior to the shooting rather than the events which took place afterwards.

Second, a crime is committed in an especially depraved manner when the perpetrator relishes the murder, evidencing debasement or perversion. *Gretzler*, 135 Ariz. at 51-52, 659 P.2d at 10-11. For instance, staging a victory celebration after the murder in which the killers sang "We Are the Champions" evidenced depravity. *State v. Lambright*, 138 Ariz. 63, 75, 673 P.2d 1, 13-14 (1983), *cert. denied*, 469 U.S. 892, 105 S.Ct. 267, 83 L.Ed.2d 203 (1984). In addition, commenting that the defendant "squealed

like a rabbit" when he was shot could support a finding of depravity. *State v. Graham*, 135 Ariz. 209, 212, 660 P.2d 460, 463 (1983) (but other circumstances suggested that Graham was motivated by peer pressure, not a depraved mind).

Some circumstances suggest that the present defendant also committed the offense in a depraved manner. After executing the victim, the trio bought hamburgers at a restaurant and went home to eat and drink beer. However, the state produced no evidence that this was a "victory feast." On the contrary, the trio had not eaten because they had no money; their dinner probably provided basic sustenance rather than occasion for celebration.

While drinking beer with his hamburgers, the defendant stated that he "never seen a man pee in his pants before." In argument, the state emphasized that remark as evidence of his callous fascination with the murder. We agree. The statement shows an indifference to the suffering of the victim and evidences a sense of pleasure which the defendant took in the killing.

We have often emphasized that the statutory, expression of "especially heinous, cruel, or depraved" is phrased in the disjunctive, *e.g.*, *State v. Wallace*, 151 Ariz. 362, 366, 728 P.2d 232, 236 (1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 3243, 97 L.Ed.2d 748 (1987), hence a finding of any one of those three factors suffices to constitute an aggravating circumstance. *State v. Libberton*, 141 Ariz. 132, 139, 685 P.2d 1284, 1291 (1984). The clear evidence of cruelty is sufficient to sustain the trial judge's finding of

that aggravating factor, but we believe that the evidence also supports the finding of depravity.

Third, to prove pecuniary gain, the state must show the murderer's motivation was the expectation of a pecuniary benefit. *LaGrand*, 153 Ariz. 21, 35, 734 P.2d 563, 577 (1987) (citing *State v. Carriger*, 143 Ariz. 142, 161, 692 P.2d 991,1010 (1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 864 (1985)). The killing and robbery need not occur simultaneously, *see Correll*, 148 Ariz. at 479, 715 P.2d at 732, but the purpose of the killing must be to further the defendant's motive of pecuniary gain from the robbery. *Hensley*, 142 Ariz. 598, 603-04, 691 P.2d 689, 694-95 (1984).

For instance, when a robber executes his victim to facilitate his escape and hinder detection, so as to successfully take and keep the stolen items, he furthers his pecuniary gain motive. *Hensley*, 142 Ariz. at 604, 691 P.2d at 694 (to prevent any witnesses from identifying the defendant after the bar robbery, he shot each witness in execution style); *State v. Harding*, 141 Ariz. 492, 500, 687 P.2d 1247, 1255 (1984) (defendant bound and gagged robbery victim, resulting in death to facilitate the robbery and evade detection).

In the present case, the defendant killed Powell to facilitate his robbery. By eliminating his victim, the defendant expected to have time to successfully flee the state with the victim's car and money, thus facilitating his pecuniary goal. The evidence fully supports the trial judge's finding of pecuniary gain as an aggravating circumstances.

2. Mitigating Circumstances

The defendant contends that the trial judge erred when he found no mitigation sufficient to require leniency. Specifically, the defendant alleges that the judge should have found that the defendant's mental capacity was significantly impaired, his actions did not create a grave risk of causing death, and his relative youth mitigated his criminal conduct. The court considered the defendant's mental impairment and age, in addition to numerous non-enumerated mitigating factors, and found no mitigating circumstances sufficiently substantial to call for leniency. The defendant also raises for the first time on appeal the factor of not creating a grave risk of causing death to another as a mitigating circumstance.

The defendant alleges that his mental lapses, attributed to a history of substance abuse, required leniency. The defendant was not under the influence of alcohol or drugs at the time of the offense; he had shared "a couple of joints" of marijuana with four other persons, but was unaffected by that brief usage. Instead, he bases his claim of mental impairment on memory impairment.

Though the judge should consider any evidence of mental impairment to mitigate capital punishment, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), some types of impairments clearly bear more weight than others. For instance, sociopathology and personality disorders have not sufficed to tilt the balance in favor of leniency. *State v. Gerlaugh*, 144, Ariz. 449, 459, 698 P.2d 694, 704 (1985); *Richmond I*, 114 Ariz. at 197-98, 560 P.2d at 52-53. Those differ in degree from a slow, dull,

brain-damaged defendant whose judgment and rationality are marginal. *See Ceja*, 126 Ariz. at 40, 612 P.2d at 496 (because Ceja was not the slow, brain-damaged individual counsel portrayed him as, his minor personality defects did not require leniency). Mental impairments have far greater mitigating effect because they may evidence an inability of the defendant to control his conduct. *State v. Doss*, 116 Ariz. 156, 163, 568 P.2d 1054, 1061 (1977). In the present matter, memory impairment played no role in affecting the defendant's control and by no means caused Powell's death.

Therefore, we find that the defendant's alleged drug-related memory lapses do not warrant reduction of the death sentence. Moreover, before sentencing, the court granted the defendant's request for a psychiatric evaluation, appointing Dr. Gurland, who was the psychiatrist that the defendant had wanted appointed for the Rule 11 examination. Dr. Gurland examined the defendant, agreeing that the defendant may have been subject to drug-related blackouts, but not psychoses or other mental defects. Thus, the defendant's condition was due solely to his abuse of drugs, and his condition did not affect his ability to control his conduct.

Second, the defendant alleges that the judge should have mitigated the death sentence due to the defendant's age, twenty. When the judge considers age in mitigation, he weighs evidence of experience and maturity. *State v. Gillies (Gillies I)*, 135 Ariz. 500, 513, 662 P.2d 1007, 1020 (1983). An age of twenty years may be some evidence but is not dispostive of inexperience and immaturity, and we have upheld findings of no mitigation of death sentences in other cases involving defendants of similar age. *E.g.*,

Gerlaugh, 144 Ariz. at 461, 698 P.2d at 706; *State v. Gillies (Gillies II)*, 142 Ariz. 564, 571, 691 P.2d 655, 662 (1984), *cert. denied*, 470 U.S. 1059, 105 S.Ct. 1775, 84 L.Ed.2d 834 (1985). In addition, the extent and duration of a defendant's participation in a murder can evidence maturity. *Gilles II*, 142 Ariz. at 571, 691 P.2d at 662. Thus carrying out a plan over a significant period of time reflects delay of gratification, which in turn evidences relative maturity; impulsive acts reflect relative youth and immaturity.

In the present matter, the defendant participated substantially throughout the entire course of the crime. Besides the responsibility he shared with his codefendants, the defendant accosted and detained Powell in the bar parking lot, singlehandedly executed him in the desert, and approached David Bilodeau seeking dynamite to destroy the victim's car. This deliberate action minimizes the effect of the defendant's relative youth. Thus, we find that his age is insufficient to call for leniency.

Third, the defendant belatedly alleges that the court should have mitigated the sentence because he could not have reasonably foreseen that his conduct would create a grave risk of death. He bases his argument on his contention that his condefendant executed Powell. However, the trial judge found, contrary to the defendant's contention, that the defendant killed Powell, and there is substantial evidence to support that conclusion. The defendant therefore cannot now allege that he could not have reasonably anticipated that shooting Powell in the head at close range might risk killing him. We find no merit in the defendant's contention that his conduct would not have foreseeably created a grave risk of death.

In addition, we have independently reviewed the record for evidence of mitigation beyond those issues presented on appeal. However, we find no mitigating circumstances sufficient to call for lenience in sentencing.

D. *Proportionality Review*

As part of our independent review,[2] we must also conduct a proportionality review to determine whether "the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Wallace*, 151 Ariz. 362, 370, 728 P.2d 232, 240 (1986); *Richmond I*, 114 Ariz. at 196, 560 P.2d at 51.

For this review, we have considered those cases in which the trial judge sentenced the defendant to death based upon a finding of two aggravating circumstances and no mitigating circumstances sufficiently substantial to require lenience. *E.g., State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670 (1985), *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985); *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750, *cert. denied*, 469 U.S. 1066, 105 S.Ct. 548, 83 L.Ed.2d 436 (1984); *State v. James*, 141 Ariz. 141, 685 P.2d 1293 (1984), *cert. denied*, 469 U.S. 990, 105 S.Ct. 398, 83 L.Ed.2d 332 (1984); *State v. Libberton*, 141 Ariz. 132, 685 P.2d 1284 (1984). In addition, we have considered those cases in which we have reduced the

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[2] Although the defendant did not challenge the proportionality of his sentence, we are still obligated to conduct a proportionality review of the sentence in this case with that imposed in similar cases. *Richmond I*, 114 Ariz. at 196, 560 P.2d at 51.

death sentence to life imprisonment. *E.g., Graham*, 135 Ariz. 209, 660 P.2d 460; *State v. Watson*, 129 Ariz. 60, 628 P.2d 943 (1981); *State v. Madsen*, 125 Ariz. 346, 609 P.2d 1046 (1980), *cert. denied*, 449 U.S. 873, 101 S.Ct 213, 66 L.Ed.2d 93 (1980); *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979); *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979). Finally, we have considered the sentences in the present case that the defendant's codefendants received for their part in the same crime.

Based upon our review of those decisions, we find that the death penalty in the present case is proportional to sentences imposed in similar cases.

VIII. PRISON TERM SENTENCES

The defendant next challenges the sentences imposed on the noncapital felonies. Specifically, he contends that the judge erred when: (1) he considered victim impact evidence; and (2) he ordered that the noncapital sentences run consecutively to his death sentence.

A. *Victim Impact*

Among his death penalty issues, the defendant contends that the trial judge erred when he considered letters of family, friends, and the public in sentencing the defendant to death. He asserts that this violated the restrictions on aggravating factors of A.R.S. § 13-703(F) as well as the eight amendment. *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

The Arizona statutory death penalty procedure restricts the trial judge to the consideration of the aggravating circumstances set out in A.R.S. § 13-703(F). The death penalty may not be considered unless the trial judge finds the existence of one of the statutory aggravating circumstances. The impact of the murder upon the family of the victim has never been a statutory aggravating circumstances under the Arizona death penalty statute.

Under the provisions of A.R.S. § 13-702(D), which applies to noncapital sentences, one of the aggravating circumstances that the trial judge must consider is:

> 9. The physical, emotional and financial harm caused to the victim or, if the victim has died as a result of the conduct of the defendant, the emotional and financial harm caused to the victim's immediate family.

However, A.R.S. § 13-702 also provides in subsection G:

> Nothing in this section shall affect any provision of law which imposes the death penalty, which expressly provides for imprisonment for life or which authorizes or restricts the granting of probation and suspending the execution of sentence.

Thus, the statutory scheme for noncaptial sentencing is separate and distinct from that applying to the sentence of death or life imprisonment. The ruling in *Booth*, barring the consideration of victim impact evidence, applies only to death penalty cases. *Id.* 482 U.S. at ___ n. 12, 107 S.Ct. at 2536 n. 12. There is no suggestion in *Booth* that victim impact evidence may not be used in noncaptial felony sentencing.

Contrary to the defendant's contention, the judge did not consider victim impact evidence in the capital sentence, but did in sentencing for the defendant's conviction on the non-capital felonies. When the judge indicated he intended to consider the letters in sentencing, he stated that they did not fall under any provisions of the death sentencing statute. It is obvious that he intended to consider that evidence only in determining the sentence to be imposed on the noncapital felony convictions for armed robbery, kidnapping, and theft by control. The trial judge's action is further substantiated by his clear listing of the factors he considered for each type of sentence. The trial judge based the death penalty only on aggravating circumstances of cruel, heinous, or depraved conduct, and pecuniary gain, but he expressly indicated that he arrived at the sentences for the other felonies based upon three aggravating circumstances that included victim impact.

Therefore, the judge only weighed victim impact in sentencing the defendant on the noncapital felonies. We find no error.

B. *Consecutive Sentencing*

The defendant also contends that the trial court erred when it sentenced him to concurrent terms for the robbery, kidnapping, and theft convictions that run consecutively to the death penalty for first degree murder. He relies on A.R.S. § 13-604(H) and the holding of *State v. Perkins*, 144 Ariz. 591, 699 P.2d 364 (1985), barring consecutive sentences for "spree" offenses arising from the same occasion.

A.R.S. § 13-604(H) governs sentence enhancement, not consecutive sentencing. *State v. Noble*, 152 Ariz. 284, 287, 731 P.2d 1228, 1231 (1987). Additionally, we expressly overruled *Perkins* to the extent that it suggests that § 13-604(H) limits a judge's ability to impose consecutive sentences. *Id.*, 152 Ariz. at 288, 731 P.2d at 1232.

Rather, our rule for consecutive sentencing is found in Arizona's multiple punishment statute, A.R.S. § 13-116. In *State v. Tinghitella*, 108 Ariz. 1, 3, 491 P.2d 834, 836 (1971), we adopted the "identical elements" test to determine when consecutive sentences violated A.R.S. § 13-116 (then A.R.S. § 13-1641). *State v. Rumsey*, 130 Ariz. 427, 430, 636 P.2d 1209, 1212 (1981), *affd.*, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1981). Under that test, the judge must eliminate all elements of one charge and determine whether the remaining facts support the other charges. *Id.*; *Tinghitella*, 108 Ariz. at 3, 491 P.2d at 836.

There was sufficient evidence in the record to independently support each of the charges. We therefore hold that the judge did not err by the consecutive sentencing in this matter.

IX. INEFFECTIVE ASSISTANCE OF COUNSEL

The defendant finally contends that he was not afforded effective assistance of counsel. He advances four challenges to his counsel's assistance, and we raise an additional concern. We address our concern first.

After the trial judge imposed the sentence in this case he asked counsel if he wanted to represent the defendant on appeal. Counsel replied, "I don't think that's best now,

considering some of the issues." Though counsel did not specify those issues, it is reasonable to assume from counsel's comment that an ineffective assistance of counsel claim would be an issue. The trial judge nevertheless appointed him to continue representing the defendant on appeal.

We believe that the trial judge should have inquired further into the matter before ordering counsel to continue to represent his client on appeal. It is important that appellate counsel be free to advance or reject the issue of effectiveness of trial counsel. We recognize that a defendant, after conviction, is often dissatisfied with the performance of his trial counsel. However, generalized dissatisfaction, without alleging a basis for an ineffective assistance claim, does not suffice to disqualify counsel on appeal. Despite the foregoing, when defense counsel advises the trial court that ineffective assistance of counsel may be an issue on appeal, the better practice is that the trial court should appoint different counsel to represent the defendant on appeal.

Following the trial judge's orders to represent the defendant, counsel directs our attention to four instances in which he alleges he acted ineffectively: (1) he focused his arguments on the distinction between "not guilty" and "innocent" instead of attacking weaknesses in the state's case; (2) he failed to raise at the suppression hearing the detective's promises to the defendant; (3) he failed to timely file a request for a Rule 11 examination; and (4) he stipulated to crucial facts rather than presenting witnesses at trial.

The Supreme Court set forth the standard for courts to apply in evaluating ineffective assistance of counsel claims. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. *Id*. For that, he must specify acts and omissions of counsel that allegedly constituted ineffective assistance. *State v. Santanna*, 153 Ariz. 147, 149, 735 P.2d 757, 759 (1987). Second, the defendant must show that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. To show that, the defendant must be able to demonstrate a "reasonable probability" that the verdict might have been affected by the error. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *State v. Schossow*, 145 Ariz. 504, 508, 703 P.2d 448, 452 (1985); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227, *cert. denied*, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985); *State v. Lee*, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984).

We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. In addition, we must evaluate counsel's performance prospectively. *Id*. Thus, the defendant bears a heavy burden to overcome the presumption that counsel's action "might be considered sound trial strategy" at the time. *Id*. (citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)).

We preliminarily note that defense counsel in the present matter stretches the bounds of credibility when he claims that he should have argued that his client was innocent. Counsel had to realize from overwhelming evidence of involvement in the crime that his client was not

innocent. In addition, the defendant's claim fails to overcome the presumption that his counsel made a sound tactical decision. *See Id*. Moreover, the second and third claims are rendered moot by our holdings that the detective's statement did not constitute a promise and the defendant was not entitled to a Rule 11 evaluation. *See supra*, Sections III, I(A). We turn to the fourth allegation.

The defendant's fourth claim, that counsel should not have stipulated to certain facts, may evidence defects in counsel's assistance, but it fails to meet the second prong of the *Strickland* test, *i.e.*, that the deficiencies prejudiced the defendant. The defendant offers no more than speculation concerning prejudice: the alleged errors "potentially [had] great impact on the ultimate outcome." To show sufficient prejudice, the defendant must point to actual bias he suffered. *State v. Richmond (Richmond II)*, 136 Ariz. 312, 317, 666 P.2d 57, 62, *cert. denied*, 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983). Mere speculation of prejudice will not suffice. *Santanna*, 153 Ariz. at 150, 735 P.2d at 760. Although counsel's performance was at times deficient, we find that it did not prejudice the defendant. We hold, therefore, that defense counsel's conduct did not deprive the defendant of his right to effective assistance.

In conclusion, we have examined the entire record for fundamental error as required by A.R.S. § 13-4035, *Anders v. California*, 386 U.S 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), and find none. We affirm the convictions and sentences.

GORDON, C.J., and CAMERON, J., concur.

FELDMAN, Vice Chief Justice, concurring.

There is no doubt that Walton was a participant in the kidnapping and robbery that eventually led to the victim's murder. Hence, there is no doubt that Walton is guilty of (felony) first degree murder. At the outset, the only issue of consequence in this case was whether Walton's punishment should be life imprisonment or death. The death penalty could be imposed only if Walton was the actual killer or acted, at the least, with reckless indifference to human life. *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

Following the aggravation/mitigation hearing, the trial judge sentenced Walton to death, finding that he had fired the fatal shot. This finding is the issue on appeal. Walton denied firing the shot. In his confession to the police, he accuses Hoover of the actual killing. Hoover, of course, accuses Walton. This is the so-called "mirror image accusation" – each of two very culpable defendants points the finger at the other, seeking some measure of leniency for himself. Hoover's girlfriend, given a very generous plea bargain, unsurprisingly supports Hoover. A witness, Bilodeau, relating one of Walton's admissions, supported Walton in his statement to the police, but more or less supported Hoover in his trial testimony. It is fair to say that given their records, their characters, and the circumstances in which each of these individuals found him or herself, not one of them is especially worthy of belief.

Nor does the physical evidence help us decide who actually shot the victim. Walton owned the murder weapon, but the police found it and the victim's car in Hoover's possession when they apprehended Hoover

and his girlfriend in California sometime after the crime in question.

Evidently the jury also found the question of who actually shot the victim difficult. From the question they asked the court, let alone the statement contained in the foreman's affidavit offered at the mitigation hearing, it is obvious that the jury was unable to decide whether Walton was the actual killer. Under the facts of this case, if Walton was the killer, he was certainly guilty of premeditated murder, but it appears the jury was unable to agree on such a finding.

Thus, this case illustrates a serious problem. The majority quite correctly holds that the United States Supreme Court has instructed us that *Enmund* findings relate only to eighth amendment issues, may be made at any stage of the proceedings, and not necessarily by the jury. *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). Moreover, the Court has not required us to adopt any particular procedure and has left each state free to adopt its own procedure in making the *Enmund* findings. *Id.* at 385, 106 S.Ct. at 697.

Exercising the discretion later granted us in *Cabana*, in *State v. McDaniel*, 136 Ariz. 188, 665 P.2d 70 (1983), we held that because there is only one crime of first degree murder, and "where the jury might have found the defendant guilty of [either] first degree murder based on a felony murder theory" or premeditated murder because both theories were submitted to the jury, the trial judge must then make the *Enmund* findings himself. *Id.* at 199, 665 P.2d at 81.

In my view, developments since *Enmund* and *McDaniel* – particularly *Tison* with its standard of reckless indifference – and our experience with the *McDaniel* procedure require a reexamination of the *McDaniel* procedure. In a system that values trial by jury, it seems anomalous to allow a judge to resolve the only true factual issue in the case and, in doing so, to reach a result that may be directly contrary to the jury's finding. Apparently here, the judge's finding was evidently one that the jury considered but was unable to reach.

If we continue to follow the *McDaniel* procedure, we may well produce decisions that conflict with the jury trial principles espoused by the United States Supreme Court in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), and by this court in *State v. Hurley*, 154 Ariz. 124, 741 P.2d 257 (1987), and *State v. Powers*, 154 Ariz. 291, 742 P.2d 792 (1987); *see also Adamson v. Ricketts*, 865 F.2d 1011, 1022-1029 (9th Cir. 1988) (en banc) (finding unconstitutional Arizona's death penalty statute because, *inter alia*, it allows the sentencing judge to find the evidence of the elements of the crime of "capital murder").

I believe that, at the very least, we must in the future consider requiring the jury to receive a separate verdict form for the premeditated murder theory in cases that have been submitted to the jury on both felony murder and premeditated murder theories. This use of separate verdict forms would give the judge in sentencing and this court in exercising its responsibility to review death penalty cases the valuable benefit of an actual jury finding, and we would also avoid many of the questions that afflict courts in reviewing death penalty cases.

MOELLER, Justice, concurring.

I agree with Vice Chief Justice Feldman's suggestion that we should adopt, for future cases, the practice of submitting separate verdict forms when, in a potential death penalty case, the case is submitted to the jury on both premeditated murder and felony murder theories. In my opinion, such a change in practice would be prudent in light of developments which have occurred since the existing practice was approved in *McDaniel* and would, I believe, be of great assistance to trial judges and to judges of this court who are attempting to resolve the increasingly complex issues presented by death penalty cases. To this extent, I join in his concurrence.

SUPREME COURT OF THE UNITED STATES

No. 88-7351

Jeffrey Alan Walton,

Petitioner

v.

Arizona

On Petition for Writ of Certiorari to the Supreme Court of the State of Arizona.

On Consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* by, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 2, 1989